Free At Last!:
Anti-Subordination and the Thirteenth Amendment
By Rebecca E. Zietlow

Abstract: Notwithstanding the powerful symbolism that liberty has in the American psyche, liberty is largely absent from our late Twentieth Century understanding of civil rights, which instead is based in the Equal Protection Clause and its promise of formal equality. People of color and women of every race have made significant advances under the Equal Protection model of equality, but they continue to lag behind whites and men under virtually every economic index. This paper argues for an alternative model of equality, an anti-subordination model, which allows decision-makers to focus on the material conditions that contribute to inequality in our society, and to remedy those conditions. That model can be found in another Reconstruction Amendment, the Thirteenth Amendment, which empowers Congress to remedy racial and economic subordination in order to further the belonging of outsiders in our society. This paper considers the abolitionist roots of the Thirteenth Amendment to aid in an understanding of its potential, and analyzes the congressional debates enacting and enforcing that Amendment. When enforcing the Thirteenth Amendment, Congress has adopted an anti-subordination approach to equality, remedying both race discrimination and the economic subordination of workers. The debates and the legislation itself create a precedent for a Twenty-First Century Congress to re-shape the meaning of “equality” and “liberty” and enact more measures to effectively address the inter-connected subordination of people of color, women, and workers of all races, in our society.
I. Introduction

For many people, the highlight of the inauguration of the first Black president of the United States was Aretha Franklin’s rendition of the song, “My Country ‘Tis of Thee.” Franklin’s voice echoed that of Marion Anderson, who sang the same song on the steps of the Lincoln Memorial in 1939 at the invitation of First Lady Eleanor Roosevelt, after Anderson was denied the opportunity to sing at Constitution Hall because of her race. The refrain of that song also punctuated Martin Luther King’s “I Have a Dream” speech in the summer of 1963, as King called for Congress to enact civil rights legislation. As the end of King’s speech, “Free At Last! Free At Last! Thank God Almighty, We’re Free At Last!” reflects, the promise of liberty has always been a powerful one in our country, not only for African Americans, but for all Americans. Liberty is also essential to an anti-subordination theory of equality, one that takes into account the material circumstances an individual needs to effectively belong and participate in our society. Section Two of the Thirteenth Amendment is a potent source of those rights.

Notwithstanding the songs and the rhetoric, the promise of liberty has largely been absent from our civil rights tradition. Since the 1950s, our civil rights law has been based not on the Thirteenth Amendment’s promise of liberty and equality, but solely on the Equal Protection Clause of the Fourteenth Amendment. In the late Twentieth Century, the equal protection based model of civil rights improved the lives of racial

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2 http://virtualology.com/virtualmuseumofhistory/hallofwomen/MARIANANDERSON.NET/
4 http://www.usconstitution.net/dream.html.
minorities and women. However, courts and legislatures enforcing that model have been unable to uproot the deeply entrenched economic inequality that plagues our society because of the model’s failure to address the intersection of race and class.

What would equality rights look like if they also encompassed the promise of liberty? One need go back only to the days of Marion Anderson’s concert to discover an alternative civil rights tradition, based in the promise of liberty and equality that is embodied in the Thirteenth Amendment. The Thirteenth Amendment, which states affirmatively that “neither slavery nor involuntary servitude shall exist,” did far more than simply end chattel slavery in the United States. That Amendment is also a source of “personal security, labor rights, and rights to minimal economic security” because its Framers intended it to empower members of Congress to address both racial and economic injustice. Section Two authorizes Congress to enforce that promise and create rights of belonging, those that promote an inclusive vision of who belongs to the national community of the United States and that facilitate equal membership in that community. This is necessary because both racial and economic barriers limit the ability of individuals to fully belong to our society. When Congress acts to enforce the

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8 See GOLUBOFF, supra note 5 at 16-51.

9 See GOLUBOFF, supra note 5 at 11.

Thirteenth Amendment, Congress relies on this alternative “anti-subordination” model of rights of belonging.

The United States Supreme Court long ago rejected the position that economic rights are fundamental rights. However, the Framers of the Thirteenth Amendment did not make such a distinction. They considered some economic rights to be human rights, starting with the right to work for wages and without being coerced to do so. They also believed that the right to engage in the economy was a fundamental human right. Most importantly, they gave future Congresses the authority to determine what other economic rights should be established and protected by the federal government. Since then, members of Congress enforcing the Thirteenth Amendment have relied on an anti-subordination model of equality, based not solely on equal treatment, but instead recognizing that both racial equality and economic rights are necessary for true equality. Section Two of that Amendment gives Congress the autonomy and the authority to go beyond formal equality and remedy the relationship between poverty, race and gender that plagues our nation.

To illustrate the anti-subordination theory of equality, this article analyzes the congressional debates over the Thirteenth Amendment and legislation enforcing that Amendment. This article focuses primarily not on the Court’s interpretations of the

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11 See, e.g., Dandridge v. Williams, 397 U.S. 471 (1970) (declining to find a substantive right to welfare benefits and applying rational basis review to restrictions on those benefits); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (declining to find a substantive right to education and rejecting a challenge to property tax based funding of public schools). This distinction is absent from the Universal Declaration of Human Rights and other international norms, under which economic rights, including the right to social security, the right to work, the right to “just and favorable enumeration” and the right to form and to join trade unions are considered to be fundamental human rights. See UNITED NATIONS UNIVERSAL DECLARATION OF HUMAN RIGHTS, Art. 22 & 23.

12 This vision is most clearly embodied in the 1866 Civil Rights act, which protects the right of all people to engage in the economy on the same basis “as white citizens.” Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified at 42 U.S.C. §§1981-1983 (2000)).
Amendment’s meaning, but instead on its interpretation by members of Congress. The Court has largely deferred to congressional enforcement of the Thirteenth Amendment, and Congress’ actions in this arena are excellent examples of what Professor Larry Kramer calls “popular constitutionalism,” constitutional interpretation outside of the courts. Advocates of popular constitutionalism question the primacy of judicial review over constitutional interpretation by the political branches, while its critics maintain that judicial review is necessary for stable and principled constitutional interpretation. This article maintains that argues that members of Congress, like members of the federal courts, have an obligation to interpret the constitutional provisions that they enforce.

When members of Congress debate and enact legislation, they create a record comparable to that of judges writing opinions. Like judicial opinions, the records of the debates and the legislation itself establish precedent upon which future Congresses can rely. Although the precedent is not binding like judicial precedents, it is helpful for future members of Congress seeking to determine the meaning of the Thirteenth Amendment’s promise of freedom and equality in the context of the Twenty-First century. Of course, members of Congress may be motivated by considerations other than constitutional principles when they participate in these debates. However, when they act

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13 See infra notes 104-111 and accompanying text.
17 For a good description of this process, see KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 1 (1999). Reasonable minds may differ over the authoritativeness of the congressional record as a document interpreting the constitution. This article assumes that the record is authoritative at least until the Court disagrees with Congress’ interpretation. At that point, the Court should generally defer to Congress’ interpretation.
to define and protect rights of belonging, members of Congress express not only a political vision but also their vision of the meaning of individual rights within our constitutional structure. Congressional debates over legislation enforcing the Thirteenth Amendment provide an excellent example of this phenomenon.

Recently, the Supreme Court has enhanced the importance of Section Two by retaining its deference to that provision even as it restricts Congress’ authority to enact civil rights legislation pursuant to the Commerce Clause and the Fourteenth Amendment. At the same time, a number of scholars have re-discovered the Thirteenth Amendment, suggesting that it might be a source of power to remedy injustice ranging from racial profiling to the mail order bride business. Members of Congress also seem to be re-discovering Section Two after years of neglect. These developments highlight the need to reconsider the scope and significance of the Section Two power. Yet until now, no scholar has analyzed Congress’ use of that power using the comprehensive approach of this article. Too often, scholars have largely viewed the Thirteenth Amendment as a source of anti-discrimination law that differs from the Fourteenth

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20 In 2000, Congress relied on Section Two to enact the Trafficking Victims Protection Act, and Congress is currently considering a Hate Crimes Act that is based in part on its Section Two power.
Amendment not in its meaning, but in its applicability to private parties.  

This view of the Thirteenth Amendment does not do justice to its potential as a potent source of economic and labor rights based on an alternative anti-subordination model of equality.

It is important to note that the Section Two power is not unlimited. Section Two authorizes Congress to end slavery, involuntary servitude, and the badges or incidents of slavery. Because of the historic link between slavery and race discrimination, this authority clearly extends to enacting civil rights legislation. Because slavery and involuntary servitude are employment practices, however brutal and inhumane, Section Two also authorizes Congress to remedy exploitative conditions in the workplace. However, Section Two is not a font of general civil or criminal law. Instead, Section Two fits well within the system of federalism established by the Reconstruction Congress, giving the federal government the primary responsibility over rights of belonging. Most importantly, Section Two enables the Twenty-First Century Congress the ability to reconsider the meaning of belonging, equality, and liberty, and synthesize those concepts into a meaningful policy of anti-subordination.

Part II of this article discusses two models of equality, formal equality and anti-subordination. While our courts have limited the Equal Protection Clause to the formal model, the Thirteenth Amendment provides a source of a new, more robust model of equality.
equality rooted in anti-subordination, go beyond requiring mere equal treatment and consider the practical impact of policies on those who have been historically subordinated in our society. Part III analyzes the debates over the Thirteenth Amendment as abolitionist members of that Congress enshrined their vision of liberty and equality into the Constitution. Part IV is an in-depth analysis of the Reconstruction era statutes based in Section Two, analyzing both the historical context and the debates over those statutes to consider their meaning as historical precedents. Those statutes reflected an anti-subordination theory of equality based in economic rights as well as racial equality. Members of the Reconstruction Congress understood that slavery was not just a system of racial subordination, but also an exploitative system of labor. They created a paradigm for an anti-subordination approach to the intersection of race and class that characterizes inequality in our society.

Part V describes the model of individual rights which the political branches adopted during the New Deal Era. That model started not with racial equality but with economic rights. Members of Congress evoked the Thirteenth Amendment when creating a statutory right to organize and bargain collectively with the Wagner Act. While members of Congress omitted racial equality from their New Deal vision, the Justice Department under President Roosevelt worked to expand those rights for racial minorities, and succeeded in convincing Congress to back them up by amending the Reconstruction Era Anti-Peonage Act to modernize it and expand its meaning. Part VI considers the New Reconstruction of the 1960s, an era in which the rights paradigm had shifted to an Equal Protection model with less emphasis on economic rights. However, even during that era Congress used its Section Two power to legislate against economic
barriers and hate crimes confronting racial minorities in the 1968 Fair Housing Act. In 2000, members of Congress also adopted an anti-subordination theory of equality when they relied on Section Two to legislate against the international trafficking of sex and other workers with the Anti-Trafficking Victims Protection Act of 2000. The TVPA uses a comprehensive approach to address the economic, racial, and gender based causes of inequality in the international labor market. Part VI concludes by considering the rich potential of Section Two as a source of a new vision of equality in the Twenty-First Century.

II. An Anti-subordination Theory of Equality

Anti-subordinating rights of belonging have their roots in Reconstruction because members of the Reconstruction Congress wanted to include newly freed slaves in the national polity. The Supreme Court’s ruling in *Dred Scott v. Sanford* was profoundly exclusionary as Justice Taney declared that people of African descent could not be United States citizens.\(^\text{27}\) After the Civil War, members of the Reconstruction Congress overturned *Dred Scott*, declared freed slaves to be citizens, and gave themselves power to define and protect fundamental human rights. When our country enacted the Thirteenth Amendment, it abolished slavery and gave Congress the power to remedy slavery’s legacy. Because slavery was an exploitative economic relationship based on the ideology of racial supremacy, members of the Reconstruction Congress relied on the Thirteenth Amendment to address the link between economic exploitation and race, and to establish the right to work free of economic exploitation.

During the Twentieth Century, the Jim Crow system enabled exploitation of black workers in the south. Black agricultural workers were treated as little better than slaves,

\(^\text{27}\) *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856).
denied access to basic government services and subject to brutal violence if they attempted to assert what rights they had under the law.\textsuperscript{28} In the north, Black workers were paid less and limited to less desirable jobs due to a slightly less virulent form of racism and segregation.\textsuperscript{29} Racism against Blacks also contributed to exploitation of white workers by again creating a downward pressure on the labor market. Thus, even after slavery, Blacks experienced the same pattern of racial and economic subordination that had characterized the institution of slavery well into the Twentieth Century.

In the 1954 case of Brown v. Board of Education, the Court held that state mandated segregation of elementary schools violates the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{30} Largely due to the plaintiff’s dramatic success in Brown, the Equal Protection Clause has been the focus of civil rights litigation ever since.\textsuperscript{31} Advocates for racial equality convinced the courts to strike down legislation that treated people unequally on the basis of race.\textsuperscript{32} Advocates for gender equality relied on the Brown paradigm to convince courts to strike down legislation that treated women unequally based on outdated gender stereotypes.\textsuperscript{33} At the same time, Congress enacted legislation enforcing the right to equal protection of the laws for racial minorities, women, the disabled, the elderly, and disabled children.\textsuperscript{34} The Equal Protection Clause

\textsuperscript{28} See GOLUBOFF, supra note 5 at 6-7.
\textsuperscript{29} Id. at 81-82.
\textsuperscript{31} See GOLUBOFF, supra note 5 at 240 (arguing that Brown established “the legal and intellectual framework that continues to dominate how lawyers and laypeople alike think about civil rights.”)
\textsuperscript{33}See, e.g., Frontiero v. Richardson, 411 U.S. 677 (1973) (striking down law providing military service dependent benefits based on gender); U.S. v. Virginia (518 U.S. 515 (1996) (finding that the exclusion of women from VMI violated the Equal Protection Clause).
conveys a potent message of equality and dignity for all people in our country. Moreover, the rights to be free of race based segregation, gender discrimination, and other discrimination based on immutable characteristics, are fundamental human rights. Thus, much has been gained from court and legislative enforcement of the Equal Protection model.\(^\text{35}\)

However, advocates for rights of belonging based on the Equal Protection Clause ran into several significant roadblocks. The first roadblock was The Civil Rights Cases, an 1883 precedent in which the Court held that the Fourteenth Amendment only applies to state action and does not extend to private discrimination.\(^\text{36}\) Second, the Court held that plaintiffs in Equal Protection cases must prove that the state acted intentionally when it discriminated against them because state practices that have only a discriminatory impact on women and racial minorities do not violate that Clause.\(^\text{37}\) Often, government policies that are based on economics have a disparate impact on racial minorities. For example, Blacks may find it harder to get a job that requires a standardized test as a job qualification because they are far more likely to attend sub-standard inner city public

\(^{35}\) Because of the state action limitation on Congress’ power to enforce the Equal Protection Clause, members of Congress based many of these measures on the Commerce Power instead, even as they evoked images of equal protection. See Rebecca E. Zietlow, *To Secure These Rights: Congress, Courts and the 1964 Civil Rights Act*, 57 Rutgers L. Rev. 945, 977-979 (2005).

\(^{36}\) The Civil Rights Cases, 109 U.S. 3 (1883). The Court recently reaffirmed the holding that Congress cannot use its power to enforce the Fourteenth Amendment to address private action in U.S. v. Morrison, 529 U.S. 598 (2000).

schools. Similarly, zoning laws that require single family housing may have the effect of excluding Blacks from neighborhoods because they are less likely to be able to afford single family homes. Currently, however, there are few if any remedies for people who suffer from such policies. Finally, the Court adopted a symmetrical formal equality approach to measures adopted to alleviate societal discrimination against women and racial minorities, applying the same heightened level of scrutiny to “benign” classifications and striking down affirmative action measures.

More than fifty years after Brown v. Board of Education, and forty years after the 1964 Civil Act, African Americans still lag behind whites, and women behind men, in virtually every indicator of economic success. Neither the promise of racial equality in the Equal Protection Clause nor the protections of workers in our statutory law have succeeded in closing this gap. Dissatisfied by the inability of the formal equality paradigm to address the roots of inequality in our society, some scholars have called for courts to adopt an “anti-subordination” paradigm, outlawing only those race or gender based practices that further the subordination of those who have suffered a history of discrimination. An anti-subordination approach to Equal Protection would enable lawmakers to go beyond formalistic doctrine and remedy the root causes of inequality.

41 For example, in 2004, Black households had a median income of $30,134, while overall median income was $44,389. http://www.census.gov/Press-Release/www/releases/archives/income_wealth/005647.html.
Yet the anti-subordination approach fits awkwardly within the Equal Protection Clause, which on its face seems to require no more than equal treatment and neutrality. Moreover, it’s not at all clear that courts are well qualified to determine which practices are “subordinating” and which are not. Indeed, the Supreme Court has gone the opposite direction in its interpretation of the Equal Protection Clause, adopting a color-blind model and striking down affirmative action programs designed along the anti-subordination model. Moreover, the Court has made it clear that Congress lacks the power to adopt anti-subordination policies that are inconsistent with its interpretation of the Equal Protection Clause.

By contrast to the Equal Protection Clause, the Thirteenth Amendment is facially based on an anti-subordination model because its promise that “neither slavery nor involuntary servitude . . . shall exist” is a positive guarantee against both race discrimination and the exploitation of workers. The Thirteenth Amendment also guarantees freedom from the “badges and incidents of slavery,” including racial violence, lack of physical mobility, and the involuntary separation of family members. This ban on slavery and involuntary servitude clearly is not neutral because it gives workers rights against their masters. It is thus designed to destroy a hierarchical system and to empower those that suffered under that system.

44 See ZIETLOW, ENFORCING EQUALITY, supra note 10 at 10.
46 The Court has recognized this fact since The Civil Rights Cases. See infra, note ___ and accompanying text.
47 See ROBERT K. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD (1947) 151 (describing the CRS strategy combating racial violence, worker exploitation and the lack of mobility).
Prior to the Civil War, anti-slavery constitutionalists stressed the fundamental human rights of slaves to argue in favor of abolishing slavery and legislating to protect those rights. They recognized that under the system of slavery, combined racism and economic subordination facilitated the exploitation of all workers in our country. Slavery is the most obvious, and extreme, example of this phenomenon. Slaveholders justified their treatment of human beings as property by arguing that those people belonged to an inferior race. The African origins of slaves made them easier to identify and therefore facilitated the capture of runaway slaves. Perhaps most importantly, slave owners relied upon racism to differentiate slaves from poor white workers and justify their poor treatment of the white workers.

In 1856, James Ashley, who was to become the original author and chief proponent of the Thirteenth Amendment in the House of Representatives, presciently pointed out the relationship between race discrimination and the economic subordination of Blacks. He observed, “Wherever the Negro is free and educated and owns property, you will find him respected and treated with consideration.” Ashley thus acknowledged the inter-connection between race and class subordination that underlay slavery, and harmed all workers by lowering the bar and disempowering all workers in their relationship with their employers. After the Civil War, Ashley and his colleagues in the Reconstruction Congress worked to remedy the racial and economic degradation that former slaves had experienced by enacting laws to create both economic rights and freedom from race discrimination.

48 Charles S. Ashley, Governor Ashley’s Biography and Messages, 6 CONTRIBUTIONS TO HIST. SOC’Y MONT. 143, 153 (1907).
49 Many abolitionists shared Ashley’s beliefs, including the founders of the Republican Party and other prominent members of Congress. See generally ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR (1995).
Section Two empowers members of Congress to abolish what they reasonably believe to be slavery and involuntary servitude, and to remedy what they reasonably believe to be the badges and incidents of slavery. An examination of judicial and congressional precedent reveals that Congress has wide latitude to define “involuntary servitude” and the badges and incidents of slavery. Building on Ashley’s vision, a Thirteenth Amendment based vision of equality would include positive rights to work under fair conditions, free from discrimination on the basis of race and gender. That vision begins with economic rights, such as the right to form a union and the right to work free from exploitation. 50 This vision takes into account the fact that racial, gender and economic subordination are inter-connected in our society. 51 When members of Congress have acted to enforce the Thirteenth Amendment, they have attempted further this vision by eliminating those barriers to a more just society and facilitate the belonging of outsiders. They have adopted an anti-subordinating approach to racial, gender and economic inequality, and adopted affirmative measures to remedy that inequality. The remainder of this article analyzes the debates over the measures to flesh out the meaning of the Thirteenth Amendment’s anti-subordination promise.

III. The Thirteenth Amendment Debates

Even before the end of the Civil War, members of the Reconstruction Congress definitively abolished the institution of slavery by enacting the Thirteenth Amendment and giving itself the power to enact “appropriate legislation” to enforce that

50 See GOLUBOFF, supra note 5 at 35 (discussing the New Deal Era progressive vision of economic rights); 56 (describing the anti-peonage campaign).
51 Id. at 79 (discussing the “inter-connectedness of racial and economic injury” in the Jim Crow South).
amendment.52 Section Two was a crucial provision to the Reconstruction Congress. The issue of whether Congress had the power to abolish slavery had been highly controversial during the years leading up to the war, and abolitionist members of Congress had chafed at their inability to act to protect individual rights.53 Section Two was the first constitutional provision to expressly empower Congress to protect rights of belonging. This Section considers the debates over the Thirteenth Amendment and its enforcement power to help discern the meaning of those provisions.54 Proponents of the Thirteenth Amendment believed that abolishing slavery was necessary not only to protect the fundamental human rights of slaves, but also to protect workers of all races from both race discrimination and economic exploitation.

A. The Amendment

From the start of the Civil War, many abolitionists believe that it would result in the end of slavery.55 However, they did not know how that would happen.56 The extent of congressional power over slavery had always been highly contested, and uncertainty over whether Congress could end slavery lingered during the War. Indeed, shortly before the War began Congress came to close to amending the Constitution to deprive Congress of the power to abolish slavery. Lincoln ally Senator William Seward proposed an

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53 See Vorenberg p. 41.

54 It is important to note that the author does not consider the meaning of the Thirteenth Amendment to be confined to either the intent of its Framers, or to the general meaning of that Amendment at the time of its ratification. Indeed, one of the innovations of the framers of the Thirteenth Amendment is that they made it clear that they intended its meaning to change over time, by establishing broad congressional authority for later Congress to enforce its provisions.


56 Even after Dred Scott, abolitionists resisted the idea of amending the Constitution. According to Michael Vorenberg, this hesitance was due to the “the widespread belief among Americans that the constitutional text should remain static.” Id. at 15.
amendment that would have prohibited adopting any amendment interfering with slavery in the southern states. It became known as the “Corwin amendment” after Ohio Representative Thomas Corwin, head of the committee to come up with compromises to avoid the War. The first Thirteenth Amendment carried both Houses of Congress and two state legislatures ratified it. However, the ratification process ended once the Rebels fired upon Fort Sumter.

From the start of the war, abolitionists in Congress felt that ending slavery would be possible, and indeed, necessary to win the war. Antislavery members of Congress such as James Ashley argued that their war powers now authorized them to end slavery in support of the war effort. Ashley argued that states had ceased to be states once they rebelled from the Union, thus ceding authority over their land and their slaves to the federal government. Others, including President Lincoln, resisted this “state suicide” theory of Reconstruction. Eventually, Lincoln came to believe that emancipation of slaves in rebellious territories was necessary for the union to end the War. Lincoln’s Emancipation Proclamation set in motion the political forces that led to the constitutional amendment.

By the winter of 1863-64, abolition had become a popular cause, in part because of the south’s brutality during the war, and in part because of the bravery of freed Blacks

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57 VORENBERG, supra note 52 at 20.
58 Id.
59 Id. at 21.
60 Id. at 22.
63 See HOROWITZ, supra note 61 at 74.
64 Id. at 30.
65 Id. at 1.
on the battle field.66 In December, 1863, Rep. James Ashley proposed the first constitutional amendment to abolish slavery.67 His amendment did not include an enforcement clause. Given that the Court had twice upheld Fugitive Slave Acts even though the Fugitive Slave Clause lacked an enforcement provision, it is possible that Ashley believed that no such provision was necessary.68 This theory is supported by the fact that Ashley accompanied his amendment by a statute enforcing its provisions. Ashley’s statute would have given Blacks the right to vote and taken that right away from the rebels.69

In the Senate Charles Sumner proposed his own amendment, which would have declared all people to be “equal before the law.”70 The Senate Judiciary Committee rejected that language and instead used the language of the Northwest Ordinance in what eventually became the Thirteenth Amendment. No record exists of the Judiciary Committee proceedings, but the debates over the 1866 Civil Rights Act indicate that at least some members of the Committee, including Lyman Trumbull and Jacob Howard, believed that their draft accomplished the same goal as Sumner’s by extending civil rights to all Americans.71

66 Id. at 36-37.
68 In Prigg v. PA, 41 U.S. (16 Pet.) 539 (1842), the Court upheld the federal Fugitive Slave Act even though the Fugitive Slave Clause did not include a provision authorizing congressional enforcement of that Clause. Prigg, 41 U.S. at 612. In Ableman v. Booth, 21 How. 526 (1859), the Court reaffirmed its ruling in Prigg and upheld a second Fugitive Slave Act that was even broader in its scope. During the Reconstruction debate, many members of that Congress cited Prigg to support a broad view of congressional enforcement power. See ZIETLOW, ENFORCING EQUALITY, supra note 10 at 45-46; Robert J. Kaczorowski, Congress’s Power to Enforce Fourteenth Amendment Rights: Lessons From Federal Remedies the Framers Enacted, 42 HARV. J. LEG. 187, 200-201 (2005).
69 VORENBERG, supra note 52 at 49.
70 Id. at 55.
71 Id. at 55.
B. The Battle for Approval

The Thirteenth Amendment was approved by the Senate on April 8, 1864 by a vote of 38-6. The battle in the House of Representatives would prove to be more difficult. It failed on the first vote, during an uneasy summer in which the war effort seemed to be failing and the question of who would be the Republican nominee for president was still up in the air.\textsuperscript{72} Most Democrats strongly opposed the provision, and with the war effort going badly, supporters of the Amendment were reluctant to say anything that might generate more opposition.\textsuperscript{73} Given the precarious political situation, few members of Congress explained what they thought the Amendment would mean, aside from ending slavery, during that initial debate. Supporters of the Amendment were notably reticent about the congressional enforcement clause, the first of its kind. Senate Democrats fiercely attacked the clause, which they said would “invade the states.”\textsuperscript{74} Republicans said little in response. They may have assumed that little congressional enforcement would be necessary because states would apply the laws of freedom equally.\textsuperscript{75} Republicans also downplayed the notion of equal citizenship so as not to offend their allies.\textsuperscript{76} They were considerably more outspoken the following year, when they exercised their power to enforce the Amendment.

Once Lincoln was nominated for re-election, he declared his support for the Amendment.\textsuperscript{77} Both parties came to see the measure as a defining issue in the

\textsuperscript{72} Id. at 152-53.
\textsuperscript{73} Id. at 59-60. There was some notable Democrats that supported the amendment, including Sen. Reverdy Johnson of Maryland and Rep. James Brooks of New York. Id. at 73-74.
\textsuperscript{74} Id. at 132.
\textsuperscript{75} Id. at 133.
\textsuperscript{76} Id. at 106.
\textsuperscript{77} Id. at 125.
presidential campaign. However, few Republicans adopted it as a campaign issue. One
of the few was James Ashley, who repeatedly affirmed “man’s equality before the law”
and boasted that he had written the anti-slavery amendment. Ashley and Lincoln both
won their re-election battles, and Lincoln and his allies declared the election a popular
mandate for the anti-slavery Amendment. Ashley and Lincoln both heavily lobbied in
favor of the Amendment. The final, successful House vote was on January 31, 1865.
Indiana radical Republican George Julian later said, “It seemed to me I had been born
into a new life, and that world was overflowing with beauty and joy.”

C. Debates and Meaning

Moderate support was needed to enact the Amendment, and some of its
supporters initially claimed that it did nothing more than to free the slaves. As the debate
progressed, however, supporters revealed a growing sense of egalitarianism. Isaac
Arnold claimed that the Amendment was a sign of a “new nation” with liberty and
equality before the law as its cornerstone. One supporter saw the amendment as
“standing on as broad a base as the Declaration of Independence.” Another said that it
was “designed . . to accomplish . . the abolition of slavery in the United States and the
political and social elevation of Negroes to the rights of white men.”

78 Id. at 142.
79 Id. at 171. The boast was inaccurate. Although Ashley was the first to introduce a version of the
amendment, Congress had adopted different language. Id.
80 Id. at 174, 187.
81 Id. at 180.
82 Id. at 208.
83 Id. at 131.
84 38th Cong., 1st Sess. 2989 (June 14, 1864).
85 Goldlove S. Orth, Cong. Globe 38th Cong. 2d Sess. Pt 1, 142-143, quoted by Jacobus tenBroek,
*Thirteenth Amendment to the Constitution of the United States: Consumption to Abolition and Key to the
86 William D. Kelly Cong. Globe, 38th Cong., 1st Sess. 2987, quoted by tenBroek, supra note 85 at 178
(1951).
During the ratification process, the issue most debated was whether the Thirteenth Amendment would provide political rights such as the right to vote, to freed slaves. Ashley and other Radicals thought that Blacks should have the right to vote.87 However, most members of Congress agreed that the Thirteenth Amendment was not a source of political rights but only of civil rights, including economic rights. Republicans thought that “the measure empowered the federal government to ensure that blacks in the former seceded states receive some civil rights, most importantly the right to make contracts and to sue in state and federal courts.”88

Many of the members of the 38th Congress had established a long record of opposition to slavery, and reasons for opposing it, that formed the background of their eventual victory. Abolitionists believed that slavery was an exploitative system of labor that violated fundamental human rights. Ending slavery would address both problems, but ending slavery alone would not be enough to remedy either the history of racial subordination or the harm that the institution had caused not only to slaves, but to all workers throughout the country. Two groups of abolitionists, anti-slavery constitutionalists and Free Soilers, played the leading roles in the 38th and the Reconstruction Congresses. Anti-slavery constitutionalists argued that slavery violated fundamental human rights protected by the Constitution. “Free soil” abolitionists stressed the economic harm that slavery caused, not only to the enslaved workers in the South, but to all workers throughout the country by depressing wage scales and de-valuing work in general. Often, members of these groups overlapped. Debates over the legislation enforcing the Thirteenth Amendment reveal that advocates of both

88 VORENBERG, supra note 52 at 221.
philosophies considered their beliefs to be enshrined into the Constitution in that Amendment.

Anti-slavery constitutionalists claimed that the Constitution should be interpreted consistently with the egalitarian principles of the Declaration of Independence and the Northwest ordinance, and that ambiguities should be resolved consistently with those egalitarian principles. They also claimed that the constitution authorized Congress to prevent the extension of slavery. The latter argument was based on three provisions of the Constitution – the provisions authorizing Congress to regulate the territories and to admit new states, the Article IV Guaranty Clause, which guaranteed to states a republican form of government, and the provision authorizing Congress to ban the importation of slaves. Thus, anti-slavery constitutionalists relied on the provisions of the original Constitution and the Bill of Rights that protected individual rights to support their claim that slavery was unconstitutional. During the debates over legislation enforcing the Amendment, they made it clear that they believed the 13th Amendment had finally enshrined their vision of liberty into the Constitution.

Another group of abolitionists, free soil abolitionists, had voiced a critique of slavery that was more economic – slavery caused the degradation of all labor and was also responsible for the plight of poor white workers. For example, James Ashley argued that slavery was a class issue, an institution of the southern aristocracy that facilitated the subordination of white workers who could not afford to own slaves and therefore competed with slaves in the labor market. Thus Ashley believed that class

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89 WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848 at 112 (1977). See LYSDANGER SPOONER, TREATISE ON THE UNCONSTITUTIONALITY OF SLAVERY.
91 FONER, FREE SOIL, supra note 49 at 50.
antagonism in the south was “the real point of danger to the ruling class of the South.”

Prominent Ohio Senator Salmon Chase agreed that the problem with slavery was “that it violated the free labor ideal of workers exchanging their labor for appropriate wages.”

The degrading impact of slavery on all labor formed the central ideology of the Free Soil Party, whose members were among the founders of the Republican Party in 1856. Moderate and conservative Republicans emphasized the impact of slavery on white workers because they believed this argument would be more persuasive than moral arguments. In Congress, Free Soilers extolled the value of economic rights, including the freedom to enter into contracts and own property. Some claimed all citizens were entitled to these economic rights. This ideology was later reflected in the 1866 Civil Rights Act, which protected economic rights such as the right to contract, own property, and have access to courts to protect that property, and linked those rights to citizenship.

The debates over the Thirteenth Amendment enforcement power reflect antebellum abolitionist thought, including the emphasis on fundamental human rights, the free soil labor tradition, and the importance of congressional enforcement power. Many members of that Congress believed that the Thirteenth Amendment provided them power to enforce a broad source of fundamental human rights. Some leaders in that Congress also believed that abolishing slavery was essential not only for protecting human rights and remedying race discrimination, but also to end an exploitative system of labor that had a negative impact on all workers. The Republican Party had been formed based on

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93 VORENBERG, supra note 52 at 14.
94 FONER, supra note 49 at 61.
an ideology of free labor, and members of that party believed strongly in workers having autonomy and mobility. They believed that ending slavery would play an important role in preventing the race to the bottom and enhancing the belonging of workers throughout the country. With Section Two, members of the Reconstruction Congress gave themselves the power to legislate to make this vision a reality.

D. The Scope of the Enforcement Power and Judicial Deference

During the debates over enforcement legislation, members of the Reconstruction Congress made it clear that they believed that they had given themselves broad enforcement power with Section Two. Trumbull and his colleagues asserted their authority to determine for themselves the scope of their power notwithstanding the Court ruling to the contrary. Members of Congress repeatedly invoked the broad test for congressional power in the Supreme Court case of McCulloch v. Maryland to illustrate the meaning of the word “appropriate” in Section Two. Senator Trumbull explained, “What that ‘appropriate legislation’ is, is for Congress to determine, and nobody else.”

Responding to President Johnson’s veto of the act, Rep. Cook exclaimed that Section Two meant “that Congress shall have the power to secure the rights of freemen to those men who had been slaves. It meant, secondly, that Congress should be the judge of what is necessary for the purpose of securing them those rights.” Thus, it is clear that the

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97 FONER, supra note 49 at 16.
98 Id. at 47.
99 Section One of the 1866 Act declared that all persons born within the jurisdiction of the United States were United States citizens. Civil Rights Act of 1866, ch. 31, 14 Stat. 27. This provision directly conflicted with the Court’s ruling in Dred Scott v. Sanford that people of African descent could not be American citizens. Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1856).
100 Id. at 1118 (Rep. Wilson); 42d Cong., 1st Sess., 693 (Sen. Thurman); Id. at 728 (Sen. Sherman).
101 Id. at 43.
Framers of the Thirteenth Amendment intended Congress to have substantial autonomy to enforce its promise.\textsuperscript{103}

In Jones v. Mayer, the Court followed the 38\textsuperscript{th} Congress’ lead and applied a deferential approach to Congress as it upheld a provision of the 1866 Civil Rights Act, which prohibits race discrimination in real estate transactions, as a valid exercise of the Section Two power.\textsuperscript{104} Citing The Civil Rights Cases, the Court noted that Congress’ Section Two power extends to eliminating the badges and incidents of slavery. The Court observed, “Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to transform that determination into effective legislation.”\textsuperscript{105} Thus, the Court applied a highly deferential standard to congressional enforcement of the Thirteenth Amendment.

Since Jones, the Court has continued to defer to Congress, despite rulings limiting other congressional powers.\textsuperscript{106} Last term, in CBOC West, Inc. v. Humphries, the Court held that 42 U.S.C. §1981, a Section two based statute which prohibits race discrimination in contracts, encompasses a complaint of retaliation against a person who has complained about race discrimination against another employee.\textsuperscript{107} In his majority opinion, Justice Breyer relied on cases in which the Court had broadly interpreted §1981

\textsuperscript{103} The question of the proper relationship between courts and Congress arose a couple of years later when Congress considered a bill that would have prohibited the ongoing practice of state courts imposing servitude as a sentence for a crime. Opponents of the bill argued that Congress lacked the power to overturn the state courts’ sentencing orders. See Cong. Globe, 39\textsuperscript{th} Cong., 2\textsuperscript{nd} Sess. 345 (Rep. Finck). In response, Representative John Kasson insisted, “I do assert that Congress, as the power originally creating the clause, has the right to construe it, and that there is not a loyal tribunal in this country that will dare to treat with disrespect the construction given by this body to this clause of the Constitution.” Cong. Globe, 39\textsuperscript{th} Cong., 2\textsuperscript{nd} Session, 345. While Kasson conceded that he believed the Supreme Court would have the final say on constitutional matters, he believed that the Court would and should defer substantially to Congress.

\textsuperscript{104} Jones v. Mayer, 392 U.S. 409, 439 (1968).

\textsuperscript{105} Id. at 440.


and another provision of the 1866 Civil Rights Act, 42 U.S.C. §1982, which prohibits race discrimination in real estate transactions.\textsuperscript{108} The Court pointed out Congress had overruled its earlier interpretation of §1981 not to apply to discrimination after the making of a contract\textsuperscript{109} by amending §1981 in the 1991 Civil Rights Act.\textsuperscript{110} The Court thus emphasized stare decisis and deference to Congress in this decision broadly interpreting §1981.\textsuperscript{111} Therefore, both the Court’s ruling and its reasoning make it appear likely that the Court will continue to defer to Section Two, allowing Congress substantial authority to use Section Two to expand rights of belonging. By substantially deferring to Congress, the Court has left ample room for that body to enforce the Thirteenth Amendment.

\section*{IV. Enforcing the Amendment - Reconstruction}

This Part explores congressional debates over legislation enforcing the Thirteenth Amendment, as members of Congress fleshed out the meaning of the Amendment. By the time the Amendment became law in December 1865, a consensus had developed that the Thirteenth Amendment protected at least people’s right to life, liberty and property.\textsuperscript{112} During these debates, an anti-subordination philosophy emerged, one that combined the abolitionists’ concern with protecting fundamental human rights (including the right to travel, the right to enter into contracts and the right to be free of race discrimination) and remediating the economic exploitation of all workers. Those debates, and the legislation enacted by that Congress, indicate that the members of the Reconstruction Congress believed that the Thirteenth Amendment itself transformed freed slaves into individuals

\begin{itemize}
\item\textsuperscript{108} CBOCS, 128 S.Ct. at 1955-1956.
\item\textsuperscript{109} See Patterson v. McLean, 491 U.S. 164 (1989).
\item\textsuperscript{110} 105 Stat. 1071, cited by the Court in CBOCS, 128 S.Ct. at 1957.
\item\textsuperscript{111} CBOCS, 128 S.Ct. at 1958.
\item\textsuperscript{112} Id. at 232.
\end{itemize}
with rights equal to white citizens, bestowing upon them positive rights – that their experience of freedom would be the opposite of slavery. The legislation that this Congress enacted offers a concrete example of their vision of freedom.

Members of the Reconstruction Congress used their power to remedy two aspects of the institution of slavery. The first was the system of white supremacy that southerners had used to justify that institution. The second was the exploitative labor practices exemplified by the slave master’s ownership of his workers, but also perpetuated more broadly by the practice of peonage and other involuntary servitude, unrelated to race. They understood the synthesis of race and economic exploitation that underlay the system that they sought to abolish. Moreover, they believed that they had broad authority to recognize that synthesis and enact “appropriate” measures to remedy its legacy.

The members of the Reconstruction Congress enforcing the Thirteenth Amendment adopted an anti-subordination theory of equality as they acted to enforce the Amendment’s promise of freedom and equality. They relied on the Thirteenth Amendment as a source of power to require racial equality in the exercise of fundamental rights, to define those rights broadly, and to make them enforceable against both state and private actors. They also directly addressed the exploitation of workers by outlawing not just slavery, but also peonage and other “slavery like” employment practices. They believed that affirmative measures to end race discrimination and raise the status of all workers were necessary to enforce the fundamental rights of freed slaves and others in our society. These statutes are evidence that members of the Reconstruction Congress acknowledged the connection between racial and economic exploitation, and attempted to

113 tenBroek, supra note 85 at 183.
remedy both. Their anti-subordination theory of equality encompassed both liberty and equality rights, because for freed slaves, liberty in the economic sphere (including liberty to enter into contracts, choose one’s employer, and travel to find family members and employers) was necessary for racial equality.

A. Civil Rights Legislation

To the members of the Reconstruction Congress, the Amendment did more than just abolish slavery – it enabled congressional enforcement of rights of belonging. As Senator Lyman Trumbull explained, “It is idle to say that a man is free who cannot go and come at pleasure, who cannot buy and sell, who cannot enforce his rights. These are rights which the first clause of the constitutional amendment meant to secure to all.”

Senator William Sherman agreed, noting that the Thirteenth Amendment was “not only a guarantee of liberty to every inhabitant of the United States, but an express grant of power to Congress to secure this liberty by appropriate legislation.” The Reconstruction Congress relied on the Thirteenth Amendment to enact legislation to end the subordination that resulted from the denial of fundamental rights based on race, and from the brutal economic exploitation of slavery.

They understood that the task they had taken on would be difficult, even overwhelming. As Senator Jacob Howard pointed out during the debate over the 1866 Civil Rights Act,

We are told that the amendment simply relieves the slave from obligation to render service to his master. What is a slave in contemplation of American law, in contemplation of the laws of all of the slave states? We know full well . . . he had no rights nor nothing which he could call his own. He had not the right to become a husband or a father in the eye of the law, he had no

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115 Id. at 41.
child, he was not at liberty to indulge the natural affections of the human heart for children, for wife, or even for friend. He owned no property, because the law prohibited him. He could not take real or personal estate either by sale, by grant, or descent or inheritance. He did not own the bread he carried and ate. He stood upon the face of the earth completely isolated from the society in which he happened to be . . .

Remedying this situation would require strong, affirmative measures. Even before the Thirteenth Amendment became law, Congress established the Freedman’s Bureau and began to consider civil rights legislation. Once the Amendment became law, Congress used its Section Two power to enact far-reaching civil rights statutes, abolish slavery and the slavery-like practice of peonage, and prohibit the kidnapping of slaves.

The primary goal of those enforcing the Thirteenth Amendment was to place freed slaves on an equal footing to their white compatriots with regard to their right to engage in economic relationships. Slaves had been unable to enter into contracts, purchase property, or engage in any simple economic transactions. They also lacked the ability to form families, and to the extent they did so, they were in constant risk of losing their children, spouses, or other loved ones. As E.C. Ingersoll of Illinois explained, he believed that the Thirteenth Amendment “(would) secure to the oppressed slave his natural and God-given rights . . . a right to live, and live in freedom . . . a right to till the soil, to earn his bread by the sweat of his brow, and to enjoy the rewards of his own labor . . . A right to endearments and the enjoyment of family ties.”

116 Id. at 504.
Reconstruction Congress believed that the Thirteenth Amendment was a source of congressional enforcement of what they believed to be fundamental human rights. These rights included the ability to engage in the economic arena free of the fetters of race discrimination and economic exploitation.

Opponents of these measures objected that the Act exceeded Congress’ Section Two power because the Thirteenth Amendment was solely intended to end slavery, not to protect individual rights. In their response to these objections, proponents of the Act made it clear that they equated freedom with fundamental human rights, and that they believed that Section Two empowered them to make this vision a reality. Members of Congress overwhelmingly adopted the view of the proponents, approving the 1866 Civil Rights Act and all other Reconstruction measures by well over the 2/3 margin needed to overcome the veto of President Johnson. To insure that they had the power to enforce these rights against state governments, they also enacted the Fourteenth Amendment. A century later, the Court agreed with the vast majority of the Reconstruction Congress and upheld sections of the 1866 Act as valid enforcement of the Thirteenth Amendment.

1. The 1866 Civil Rights Act

Immediately after the Amendment became law on December 18, 1865, the Amendment’s sponsor in the Senate, the well-respected lawyer Lyman Trumbull, introduced a bill to enforce its provisions, which became the 1866 Civil Rights Act. That Act provided that all persons born in the United States would be citizens and would enjoy the same right “to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase and lease, sell, hold and convey real and personal property and to full and equal benefit of the laws and proceedings for the security of person and
property as is enjoyed by white citizens." His bill provided that all persons within United States jurisdiction “shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.” The debate over the 1866 Civil Rights Act included the first open discussion of the scope of the Section Two enforcement power. By this time, those members of Congress who thought that congressional enforcement might not be necessary had to confront the oppressive Black Codes enacted by former slave states and therefore embraced a broad reading of the enforcement power. Their leader, Senator Trumbull, explained that he believed that Section Two enabled Congress to protect the fundamental rights of not only the newly freed slaves, but all persons within their jurisdiction.

Senator Trumbull explained, “The second clause of that amendment was inserted for some purpose . . . the purpose . . . of preventing State Legislatures from enslaving, under any pretense, those whom the first clause declared should be free.” Senator Lane agreed that the Thirteenth Amendment “made it your special duty by the second section of that amendment, by appropriate legislation, to carry out that emancipation. . . . I do not consider that the second section of that amendment does anything but declare what is the duty of Congress, after having passed such an amendment to the Constitution of the United States, to secure them in all their rights and privileges.” Lane explained that the bill would “give effect to the proclamation of emancipation and to the

120 April 9, 1866, ch. 31, § 1, 14 Stat. 27.
121 Cong. Globe, 38th Cong., S. 41.
constitutional amendment.” Thus, these members of the Reconstruction Congress, both of whom had supported the Thirteenth Amendment, explained that to them freedom meant more than the end of slavery. To them, freed slaves were entitled to the fundamental rights needed to end the years of subordination they had suffered under the yoke of slavery.

The best evidence of this view is the Citizenship Clause of the 1866 Act, which provided that “All citizens of the United States shall have the same right, in every State or Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.” By enacting this clause, members of Congress indicated that they believed that by ending slavery, the Thirteenth Amendment had overturned the Court’s ruling in *Dred Scott* that African Americans could not be citizens. Eventually the Reconstruction Congress explicitly ratified their view that freed slaves were citizens with the Citizenship Clause of the Fourteenth Amendment.

As the Citizenship Clause indicates, supporters of the 1866 Act wanted it to implement monumental change, transforming former slaves into equal citizens. Senator Howard explained, with “respect to all civil rights there is to be hereafter no distinction between the white race and the black race.” Senator Henry Lane agreed that the goal of the Act was to ensure “that these freedmen shall be secured in the possession of all the rights, privileges and immunities of freemen; in other words, that we shall give effect to

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126 The Fourteenth Amendment Citizenship Clause was added at the last minute, in part because many members of Congress did not think it was necessary. See Cong. Globe, 39th Cong., 1st Sess. at 2768, 2890.
127 Id. at 504.
the proclamation of emancipation and to the constitutional amendment.” Rep. Thayer echoed Lane’s theme, announcing that “The sole purpose of the bill is to secure to that class of persons the fundamental rights of citizenship . . . those rights which are common to all citizens of civilized states, those rights which secure life, liberty and property.”

He explained that the Thirteenth Amendment was intended “to declare not only that slavery shall be abolished in fact and in deed . . . that all features of slavery which are oppressive in their character, which extinguish the rights of free citizens, and which unlawfully control their liberty, shall be abolished and destroyed forever.”

Opponents of the 1866 Act argued that Section Two was insufficient to empower Congress to enact such a statute because that power was limited to the simple task of ending the institution of slavery. Since most of those expressing a restrictive view of the enforcement power had opposed the Thirteenth Amendment to begin with, the Republican majority largely disregarded their critique. However, that majority took more seriously the concerns of their fellow Republican, Representative John Bingham. Bingham supported the Act on principal but his doubts over congressional authority to enact it inspired him to propose the Fourteenth Amendment to unequivocally empower Congress to enact a wider range of civil rights legislation. Representative Bingham was well respected, and his fellow Republicans acted quickly to ratify what they

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128 Id. at 602.
129 Id. at 1124.
130 Id. at 1152.
131 See Cong. Globe, 39th Cong., 1st Sess. 476 (statement of Sen. Saulsbury); Id. at 498 (Statement of Sen. Van Winkle); Id. at 499 (Sen. Cowan).
considered to be “his” Fourteenth Amendment. However, few of them joined him in voting against the Act, which was approved by an overwhelming majority over the veto of President Johnson.

Two sections of the 1866 Civil Rights Act - now codified as 42 U.S.C. §1981, which includes its prohibition on race discrimination in the making and enforcing of contracts, and 42 U.S.C. §1982, which prohibits race discrimination in real estate transactions, provide significant remedies for people who are victims of private race discrimination when they attempt to engage in basic economic transactions. It is also clear that members of this Congress did not see the rights of freedom as limited to economic rights. While they were divided over whether those rights included the rights to vote, they agreed that the right to sue in court was a fundamental right, protected by their first civil rights statute.

In Jones v. Mayer, the Court agreed with the majority of the Reconstruction Congress and upheld §1982 as authorized by Section Two of the Thirteenth Amendment. In that case, an African American couple sued a real estate developer alleging that he had refused to sell them a home because of their race, in violation of 42 U.S.C. §1982. The Court held that the statute was not limited to state action because the members of the Reconstruction Congress “plainly meant to secure that right (to purchase real estate)

134 See ZIETLOW, ENFORCING EQUALITY, supra note 10 at 49.
135 Id. at 1809, 1861. After the 14th Amendment was ratified, Congress re-enacted the provisions of the 1866 Act as part of the 1871 Enforcement Act. Need citation. Now codified as 42 U.S.C. §1985 (as amended); 18 U.S.C. §242.
136 In 1968, Congress supplemented §1982 with the Fair Housing Act.
137 In July, 1867, Senator Charles Sumner proposed a bill which would extent Negro suffrage to non-rebel states, arguing that the act fell within Congress’ power to enforce the 13th Amendment. See Cong. Globe, 40th Cong., 1st Sess. S. 614. The bill failed by a vote of 12 to 22. Id.
against interference from any source whatever, whether government or private." The Court found that Congress’s determination that racial discrimination in real estate transactions was a badge and incident of slavery was rational because “the exclusion of Negroes from white communities became a substitute for the Black Codes” that members of the Reconstruction Congress intended the statute to abolish. Thus, the Court ratified the anti-subordination mission of the Reconstruction Congress.

2. The 1871 Enforcement Act

One of the most far-reaching civil rights acts ever enacted by Congress, the 1871 Enforcement Act (also known as the Ku Klux Klan Act), was also based in the Section Two power. That statute imposed civil and criminal penalties on state and private actors for conspiracies to deprive a person of exercising “any right or privilege of a citizen of the United States.” The statute reacted to the race-based violence that plagued the southern states, as Reconstruction progressed. When freed slaves attempted to exercise their new rights, they often confronted violent opposition from their neighbors. The Ku Klux Klan formed and engaged in organized violence aimed at suppressing the rights of newly freed slaves and intimidating them and those whites who supported them. By 1871, rampant violence in southern states had convinced members of Congress that the federal authorities could not maintain order without stronger enforcement provisions. Supporters intended the 1871 Enforcement Act to give the federal government more power to enforce the new rights that it had created, including the 1866 Civil Rights Act,

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139 Id. at 423.
140 Id. at 441.
143 Id. at 1049.
establishing a broad federal protective shield over the civil rights of persons within Congress’ jurisdiction. The statute empowered the federal government to stop private acts that subordinated people through the use of violence to stop them from exercising their fundamental rights.

On March 20, 1871, Representative Butler of Massachusetts introduced the Act, calling it a bill “to protect loyal and peaceable citizens in the South in the full enjoyment of their rights, persons, liberty and property.”144 The Act created civil and criminal penalties for conspiracies to deprive a person of exercising “any right or privilege of a citizen of the United States.”145 Speaking in support of the Act, Senator Ames explained that Republicans in the south had suffered from violence and petitioned for this relief.146 He pointed out that the violence was particularly bad leading up to elections, and argued that the violence was intended to disempower the Republican Party in the south by murdering their leaders.147 He claimed, that when “this white man’s party shall dominate, should it ever, you will see class legislation so harsh and cruel as either to force the colored people into a serfdom worse than slavery.”148 Thus, Senator Ames believed that this legislation was necessary for the political empowerment of former slaves and anyone else who dared to challenge the system of white supremacy which had been the basis for slavery. White supremacy was fast taking hold again of the south, and would eventually provide the basis for the subordination of blacks under Jim Crow. The 1871 Enforcement Act was Congress’ last attempt to stop this re-entrenchment.

146 Cong. Globe, 42nd Cong., 1st Sess. 196.
147 Id.
148 Id.
Opponents of the 1871 Enforcement Act argued that it was beyond Congress’ power because the Fourteenth Amendment did not empower Congress to remedy private violence.149 Others argued that the Thirteenth Amendment could only address state laws because only states had the power to “remand or attempt to remand” a person to slavery.150 However, this view was resoundingly rejected. Proponents relied on both the 13th and 14th Amendments as justifications for the Act. The chief sponsor of the bill, Rep. Shellaburger, explained that the act was modeled on the second section of the 1866 Civil Rights Act. He pointed out that the 1866 Act was enacted to enforce the Thirteenth Amendment. If the 1866 Act was constitutional, he argued, than so was his bill. In Shellaburger’s opinion, the Thirteenth Amendment “reversed and overthrew the State constitutions creating slavery and prohibited the States from ‘denying’ the slaves citizenship” and Section Two gave Congress power to enforce this first provision by “appropriate legislation;” or, “in other words, to enforce the rights of citizenship to which the slave was admitted by act of his emancipation.”151

Rep. John Bingham agreed with Shellaburger that the statute fell within Congress’ power to enforce the Thirteenth Amendment. He pointed out that the Thirteenth Amendment imposed a new limitation on the states, and gave a new power to Congress. It prohibited states from allowing slavery, and authorized Congress to “make it a felony punishable by death to reduce any man, endowed with immortal life, into a thing of trade, an article of merchandise.”152 Bingham continued, “In such a case the nation would

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151 Id. at H. 68.
152 Id. at H. 85.
inflict the penalty for the crime on individuals, not upon States.” Senator Edmunds agreed, maintaining that “Under the Thirteenth Amendment there is no question but that Congress may take all necessary means to prevent the re-establishment of slavery.”

Shellaburger also argued that the Act fell within Congress’ power to enforce the privileges or immunities of citizenship under Section Five of the Fourteenth Amendment, because Congress had the power to protect the exercise of the rights of citizenship when the states were failing to protect them. Rep. Hoar agreed, echoing Shellaburger’s theory of equal protection and pointing out that the Klu Klux Klan was terrorizing people because of their loyalty to the United States. These members of Congress rejected the argument that the Fourteenth Amendment only reached state action, pointing out that the amendment also guarantees the equal protection of the laws. Members of Congress who voted in favor of the Act presumably relied on both Amendments to justify their regulation of private criminal activity.

Sadly, the Enforcement Act was not enforced by the federal government for almost a century, as Jim Crow took hold of the southern states. During the Second Reconstruction of the 1960s, however, the Justice Department relied on the statute to protect civil rights workers, and the Court upheld it. In what was arguably the apex of the Warren Court’s deference to Congress, Griffin v. Breckenridge, a unanimous Court

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153 Id.
154 Id. at S. 693.
155 Id. at 68-69. Although the Supreme Court seemed to adopt this view in U.S. v. Guest, 383 U.S. at 783, it resoundingly rejected it in U.S. v. Morrison, 529 U.S. 598 (2000).
158 In U.S. v. Guest, the Supreme Court upheld the Act as an exercise of the Section Two power, finding that theory to be more persuasive, and sidestepping the controversial issue of whether the Fourteenth Amendment could be enforced against private parties. United States v. Guest, 383 U.S. 745, 783 (1966). Thus, the Court agreed with the members of this late session of the Reconstruction Congress that the Section Two power was both flexible and broad.
upheld a cause of action under 42 U.S.C.§1985(3) brought by a group of African American men against private citizens who had beaten them up based on the mistaken belief that the victims were civil rights workers.\(^\text{159}\) The indictment alleged that defendants conspired to deprive the victims of their rights to freedom of speech, movement, association and assembly, and their right to petition the government for redress of their grievances.\(^\text{160}\) The Court held that §1985(3) was a valid exercise of the Section Two power because “[t]he varieties of private conduct that (Congress) may make criminally punishable or civilly remediable extend far beyond the actual imposition of slavery or involuntary servitude. By the Thirteenth Amendment, we committed ourselves as a nation to the proposition that the former slaves and their descendants should be forever free.”\(^\text{161}\) Thus, in *Griffin* the Court held that the Thirteenth Amendment authorized Congress to protect virtually all civil rights from violation by private actors, as long as those actors were motivated by “some racial, or perhaps otherwise class-based, invidiously discriminatory animus.”\(^\text{162}\) Thus, the Court’s ruling was consistent with the intent of the Framers of the Thirteenth Amendment, who believed that the Amendment empowered them to protect fundamental rights.

Analyzing the Reconstruction Era civil rights legislation debates should also put to rest the question of whether Congress’ Section Two power is limited to remedying discrimination based on race. Some scholars have argued that the best use of the

\(^{159}\) *Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971). Justice Harlan concurred in the opinion but agreed with the Court’s interpretation of the Section Two power. Id. at 107 (Harlan, J., concurring).

\(^{160}\) Id. at 90.

\(^{161}\) Id. at 105.

\(^{162}\) Id. at 102.
enforcement power is to remedy race-based discrimination.163 Others claim that the power is not so limited.164 While the Court has indicated that Section Two might be limited to remedying race discrimination, it has defined the meaning of “race” broadly, consistently with the understanding of racial classifications at the time of Reconstruction. Neither members of Congress nor the Court have ever considered Section Two to be limited only to discrimination against African Americans.

While it is clear that the principal concern of the Reconstruction Era Congress was to protect the rights of the newly freed slaves and their northern sympathizers, those members of Congress did not intend the protections of the Thirteenth Amendment to be limited to newly freed slaves. They intended to protect all races from invidious discrimination. This is evidenced in language of the Civil Rights Act of 1866, which granted “any person” the same rights as a white citizen, and the Enforcement Act which protected “any person or class of persons” from conspiracies to deprive them of their civil rights. Reconstruction Era statutes based on Section Two prohibited peonage regardless of its source, expressly prohibiting Native Americans treating other Native Americans as peons, and addressing the peonage like exploitation of young Italian immigrants in urban areas.165 Thus, it is apparent that the Framers of the Thirteenth Amendment viewed it as a broad font of liberty-based rights not just for slaves, but for every person within its jurisdiction.

163 See William M. Carter, Jr., Race, Rights, and the Thirteenth Amendment, supra note 19 at 1315-16 (“[A]s the group’s link to slavery grows more attenuated, the nature of the injury must be more strongly connected to the system of slavery to be rationally considered a badge or incident thereof.”).
164 See Alexander Tsesis, A Civil Rights Approach: supra note 19 at 1836 (“Thirteenth Amendment statutes may likewise respond to discrimination, but they may also interpret the meaning of “liberty” in the constitution and act upon it.”).
165 See infra, notes 180-186 and accompanying text.
The Court has never imposed a racial limitation on Section Two based legislation. As the Court pointed out in U.S. v. Hodges, the Thirteenth Amendment “reaches every race and individual, and if in any respect it commits one race to the nation, it commits every race and every individual thereof. Slavery or involuntary servitude of the Chinese, of the Italian, of the Anglo-Saxon, are as much within its compass as slavery or involuntary servitude of the African.”\(^{166}\) In Griffin v. Breckenridge, the Court interpreted § 1985 to apply only to conspiracies based on “racial, or perhaps otherwise class-based, invidiously discriminatory animus.”\(^{167}\) However, that ruling does not limit Congress from enacting new legislation prohibiting other types of discrimination. Moreover, the Court has interpreted the meaning of race broadly, to cover any group of people that was considered to be a different race from the Caucasian race by the Framers of the Thirteenth Amendment.

However, the Court has agreed with Congress that Section Two is a potent weapon to address race based animus. In St. Francis College v. Al-Khazraji, the Court held that a person of Arabic descent could bring a discrimination claim under §1981.\(^{168}\) The Court noted that at the time of Reconstruction, the racial classifications commonly used in the twentieth century were divided into a number of subsidiary classifications, and the legislative history of the Thirteenth Amendment is filled with references to a variety of races, including Scandinavian, Chinese, Latin, Spanish, Anglo-Saxon, Jews, Mexicans, Mongolians, Gypsies, and Germans.\(^{169}\) Thus, “[p]lainly all those who might

\(^{166}\) Hodges v. United States, 203 U.S. 1, 8 (1906).
\(^{167}\) Griffin, 403 U.S. at 102.
\(^{169}\) Id. at ___. See e.g., Cong. Globe, 39\(^{th}\) Cong. at 499 (remarks of Sen. Cowan, referring to gypsies, Chinese, Mongolians, Germans, “Hottentots” and “the Indo-European race”); Id. at 497 (remarks of Sen. Van Winkle, referring to gypsies, Indians and Chinese).
be deemed Caucasian today were not thought to be of the same race at the time §1981 became law.”

The Court has also held that Jewish plaintiffs could raise claims under §§1981, 1982 and 1985(3) because their synagogue had been sprayed with anti-Semitic slogans. Noting that “the question before us is not whether Jews are considered to be a separate race by today’s standards, but whether, at the time §1982 was adopted, Jews constituted a group of people that Congress intended to protect,” the Court concluded, “Jews and Arabs were among the peoples considered to be distinct races and hence within the protection of the statute.” Therefore, while the Section Two power is not limited to remedying race discrimination, it seems clear that Congress could use its Section Two power to remedy a broad range of racial subordination.

B. Protecting the Rights of Workers with the Anti-Peonage Acts

Members of the Reconstruction Era Congress made it clear that they intended not only to ban slavery, but also slavery-like employment practices. This is clear from the face of the Thirteenth Amendment, which bans not only “slavery” but also “involuntary servitude.” That Congress enacted several statutes banning the practice of peonage, a system by which debtors are bound in servitude to their creditors until their debts are paid. They also had to consider when conditions of the imprisonment of duly convicted criminals crossed the line to prohibited “involuntary servitude.” These debates reveal a broad view of Congress’ power to address labor relations pursuant to Section Two. That Congress used its power to end employment practices that subordinated workers without the use of brute force that characterized chattel slavery. Moreover, those measures were

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not limited to racial minorities, but intended to improve the status of all workers regardless of race.

On March 2, 1867, Congress enacted the first Anti-Peonage Act. The Act prohibited “the holding of any person to service or labor under the system known as peonage” in any place in the United States or the territory of New Mexico.172 The Act described peonage as “establish(ing), maintain(ing) or enforce(ing), directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise.”173 The Act also prohibited arresting or returning any person to the condition of peonage.174 In the Senate, opponents argued that peonage was voluntary if the peon voluntarily entered into the relationship with his creditor.175 Supporters of the Act claimed that it did not matter whether labor chose servitude –what mattered was “whether the resulting condition was degrading to workers and employers.”176 For example, Senator Buckalew explained that the terms of debt service were “always exceedingly unfavorable to” the laborer, and the system “degraded both the laborer and the owner himself.”177 The Sponsor of the bill, former Free Soiler Senator Henry Wilson, explained that the Bill would elevate the status of all low wage workers because where peonage had been eliminated, “peons who once worked for two or three dollars a month are now able to command respectable wages.”178 In the House, there was

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172 39th Cong., Sess. 2, Ch. 187, March 2, 1867.
173 Id.
174 Id.
177 Cong. Globe, 39th Cong. 2d Sess. 1572.
178 Id. at 1571.
little debate over the Anti-Peonage Act. Rep. Kasson explained that he believed that peonage was “very much like slavery,” and his colleagues evidently agreed.

The Reconstruction Congress also enacted two little known anti-peonage measures. The first, the 1874 Padrone Act, prohibited the practice of bringing children from Italy to large cities, isolating them, and exploiting their labor. It was enacted with virtually no opposition despite the fact that it extended its protections far beyond African American freed slaves. The second provision was a joint resolution conveying authority upon the United States military to “reclaim from peonage” women and children being held in that condition “in the territory adjacent to their homes” and on the Navajo reservation. These provisions reflect the Reconstruction Congress’ desire to end exploitative labor practices regardless of whether they were based on racial supremacy or had any connection to the chattel slavery of African Americans.

In early 1867, Congress considered whether the practice of selling prisoners into slavery violated the Thirteenth Amendment. This practice had been approved by some state courts, including the courts in Maryland. Representative Kasson spoke in favor of a joint resolution declaring this practice “involuntary servitude” prohibited by the Thirteenth Amendment, notwithstanding the courts’ approval. Kasson asserted his authority to interpret the Amendment, arguing that Section Two gave Congress the power “to define the species of slavery or involuntary servitude into which a freeman may be lawfully condemned by the laws of this country.” He argued that Congress’ construction not only has a legal force, but “a moral force throughout the United

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180 An Act to Protect Persons of Foreign Birth Against Forcible Constraint or Involuntary Servitude, ch. 464 (June 23, 1874).
States.”

Agreeing with Kasson, Rep. Thayer proposed an amendment that would make it a crime to sell or attempt to sell any person. He commented, “I do not like, I must confess, the idea of laws being passed purporting upon their face to construe the Constitution. But I assume and I presume no man doubts that the true interpretation of the constitutional amendment is exactly that which is proposed by the gentleman from Iowa.”

The bill was approved in the House by a vote of 121 to 25, with 45 abstentions. With this vote, members of the Reconstruction Congress made it clear that they did not want the nation’s penal system to become a proxy for slavery.

In Clyatt v. United States, the Court upheld the Anti-Peonage Act as an exercise of Congress’ power to enforce the Thirteenth Amendment. While the Clyatt Court rejected the Anti-Peonage indictment, two years later, in Bailey v. Alabama, the Court indicated that it was open to the argument that an employers’ use of coercion against an employee could turn what was initially a voluntary relationship into an “involuntary” one. In the 1944 case of Pollack v. Williams, the Court set the standard for determining when an employment relationship is involuntary as it struck down a Florida statute which made it a misdemeanor to leave an employer after promising to work for that employer and obtaining money for that work. The Court held that the statute violated the 13th Amendment because it forced the employee to remain in a relationship

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183 Id. at 345.
184 Id. at 346.
185 Id. at 348.
186 Unfortunately, following the Reconstruction Era, the use of forced labor on prison camps in the south became widespread, leading to a system very much like slavery. See DOUGLAS A. BLACKMAN, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008).
188 See Bailey v. Alabama, 211 U.S. 452 (1908) (rejecting an indictment under an Alabama law which made an employee’s refusal to perform an employment contract prima facie evidence of intent to commit larceny against the employer).

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of involuntary servitude to the employer.\textsuperscript{189} In his majority opinion Justice Jackson
explained that employment relationships are generally presumed voluntary because “the
defense against oppressive pay, working conditions or treatment is the right to change
employers.”\textsuperscript{190} However, “when the master can compel and the laborer cannot escape the
obligation to go on, there is no power below to redress and no incentive above to relieve a
harsh overlordship or unwholesome conditions of work.”\textsuperscript{191} Thus, the Court held that
when an employment practice gave undue power to the employer over the employee, it
violated the 13\textsuperscript{th} Amendment prohibition against involuntary servitude. The \textit{Pollack}
Court therefore articulated the anti-subordination promise of the 13\textsuperscript{th} Amendment.

More recently, in U.S. v. Kozminski, the Court held that an employment
relationship was not unduly coercive, and thus involuntary, when employers used only
psychological coercion to keep their employees in exploitative conditions.\textsuperscript{192} The Court
ruled that both statutes were limited to remedying “cases involving the compulsion of
services by the use or threatened use of physical or legal coercion.”\textsuperscript{193} In 2000, Congress
responded by enacting the Trafficking Victims Protection Act (TVPA) which prohibits
the trafficking of persons for sex or other labor or services.\textsuperscript{194} With the TVPA, Congress
overruled the Court’s interpretation of the Anti-Peonage Act by providing that
“involuntary servitude statutes are intended to reach cases in which persons are held in a

\textsuperscript{189} Pollack v. Williams, 322 U.S. 4, 15.
\textsuperscript{190} Pollack v. Williams, 322 U.S. 4, 11-13 (1944).
\textsuperscript{191} Id.
\textsuperscript{193} Id. at 949.
\textsuperscript{194} 22 U.S.C. §7101 et seq. For an excellent discussion of the TVPA and the problem of human trafficking,
see Kathleen Kim, \textit{Psychological Coercion in the Context of Modern-Day Involuntary Labor: Revisiting
condition of servitude through nonviolent coercion.”\textsuperscript{195} The TVPA is discussed more fully in Part VI of this Article.

IV. Enforcing the Amendment – The New Deal

The Section Two power lay dormant through the first half of the Twentieth Century, consistent with the country’s dominant attitude towards racial equality in the aftermath of Reconstruction. The system of Jim Crow solidified in the South, and racial segregation became the norm in the North. Congress overturned a number of Reconstruction based statutes, and the executive branch was reluctant to enforce the statutes that remained. Even as the Thirteenth Amendment’s promise of racial justice was at its ebb, the nascent United States labor movement relied upon its promise of economic freedom.

Leaders of the early labor movement nourished the free labor tradition of Reconstruction and claimed that the Thirteenth Amendment protected fundamental rights of all workers, including the right to organize and strike.\textsuperscript{196} The courts rejected this vision, instead adopting an individualistic view of the right to contract in cases such as Lochner v. New York.\textsuperscript{197} However, labor’s view of the Thirteenth Amendment had a strong influence on the political process, as Congress created a statutory right to organize and bargain collectively in the Wagner Act.\textsuperscript{198} Although supporters of the Wagner Act did not base the Act on Section Two, they made it clear that they believed that the worker’s right to organize and to strike was a liberty interest protected by the Constitution, and necessary to remedy the subordination of workers by their employers.

\textsuperscript{198} See Zietlow, \textit{Enforcing Equality}, supra note 10 at 76-77.
For political reasons, however, that Congress avoided confronting the brutal racial subordination of the Jim Crow South.

Labor’s theory of economic rights also heavily influenced the first lawyers to attempt to articulate a Twentieth Century theory of civil rights, the Civil Rights Section of the Department of Justice.199 Those lawyers also added the element of racial justice to their philosophy of individual rights. The CRS lawyers adopted an anti-subordination theory of “civil rights” that incorporated both racial and economic equality, a theory which well reflects that of the Framers of the Thirteenth Amendment.200 Congress responded to the CRS by amending the Anti-Peonage Act in 1948 to make it easier to enforce the Act against the economic exploitation of Blacks in the Jim Crow South.

The 1948 amendment to the Anti-Peonage Act enabled CRS lawyers to launch “a broader attack on the southern political economy that made (the employer-employee) relationship possible, . . . (shifting their) focus from a given laborer to the southern labor market itself – to the structural, legal obstacles to labor mobility in the South.”201 Their goal was to fill in the gaps left by New Deal protections for workers and complete the anti-subordination vision of the Reconstruction Congress.202 The CRS lawyers sought to establish a right to workers’ mobility, challenging debt peonage statutes and other state laws that made it difficult for agricultural and domestic workers to leave their employers, in order to ensure a system of free and voluntary labor for Blacks throughout the country.203 The 1948 Amendment’s use of the phrase “involuntary servitude” in the place of slavery left space for the CRS lawyers to broaden the meaning of involuntariness

199 See GOLUBOFF, supra note 5 at 17.
200 Id. at 11.
201 GOLUBOFF, supra note 5 at 153.
202 See id. at 152-153 (noting the Reconstruction era roots of the CRS approach).
203 Id. at 158.
to protect the most disempowered workers in the country. It also facilitated the CRS’ attacks on the “shocking conditions” that some workers were forced to endure as they succeeded in convincing courts that those conditions amounted to a lack of freedom guaranteed by the 13th Amendment and the Anti-Peonage Act.\textsuperscript{204} Thus, the 1948 amendment to the Anti-Peonage Act facilitated the broadest anti-subordination based legal campaign to improve the conditions of disempowered workers in the history of our country.

A. The Wagner Act

In the earlier part of the Twentieth Century, leaders in the labor movement such as Samuel Gompers of the American Federation of Labor and Andrew Furuseth of the Seaman’s Union, seized on the free soil philosophy of the abolitionist Framers of the Thirteenth Amendment. They argued that the Amendment protected the right to join a union because working without the right to organize, bargain collectively, and strike was tantamount to slavery.\textsuperscript{205} No court ever agreed with this message of “popular constitutionalism,” but some members of Congress accepted it. In 1915, Congress enacted the La Follette Seaman’s Act of 1915, which gave sailors the right to quit their jobs. Furuseth had fiercely advocated for the Act, arguing that the Thirteenth Amendment established the right to quit.\textsuperscript{206} Although he did not rely on Section Two as the basis for the statute, the Act’s chief sponsor, Senator Robert La Follette, proclaimed that he believed that the Thirteenth Amendment had become "a covenant of refuge for the

\textsuperscript{204} Id. at 162.
\textsuperscript{205} See Pope, \textit{Labor’s Constitution}, supra note 196.
Members of Congress also evoked labor’s theory of the Thirteenth Amendment during the debates over the Wagner Act in 1934 and 1935. Supporters of the Wagner Act evoked imagery of slavery and freedom, and explained that the right to organize and to strike was necessary to protect the workers’ freedom of contract.

For example, the Act’s sponsor, Senator Robert Wagner, argued that the equality of bargaining power protected by the right to organize was a fundamental right. In a 1934 speech, Wagner explained that “the right to bargain collectively, guaranteed to labor by Section 7(a) of the Recovery Act, is a veritable charter of freedom of contract; without it there would be slavery by contract.” Wagner’s ally, Rep. Carpenter of Nebraska elaborated, “The worker’s right to form labor unions and to bargain collectively is as much his right as his right to participate through delegated representatives in the making of laws which regulate his civic conduct. Both are inherent rights.” Senator Walsh agreed, “any injunction or any law that prevents a man from striking, is a law of servitude, and that is the principle we have to keep in mind. It is the difference between freedom and servitude.”

Supporters of the Wagner Act evoked the Reconstruction Era to argue in favor of the Act. For example, New York Representative William G. Connery exclaimed, “The Civil War was fought over the question of whether man should be free or enslaved. Today, despite the fact that all our people are free in that they have the right to work and

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208 Sen. Wagner speech at the conference of code authorities in Washington DC, March 5, 1934, printed in 78 Cong. Rec. 3678.
209 78 Cong. Rec. 9060 (May 17, 1934).
210 78 Cong. Rec. 12034 (June 13, 1934).
live where they please . . . there are many who contend that our toilers live in virtual
economic slavery in that they are denied an income which will provide a decent standard
of living for themselves and their families and too often they are denied the right of
collective bargaining.”211 Rep. Vito Marcantonio agreed, “How about the liberty of the
worker? Unless Congress protects the workers what liberty have they? Liberty to be
enslaved, liberty to be crucified under the spread-out system, liberty to be worked to
death under the speed-up system, the liberty to work at charity wages, the liberty to work
long hours.”212 His colleague, Rep. Wood, said simply, “(This bill) involves an age-old
principle – the desire for freedom.”213 Rep. Truax of Ohio called the bill “an
emancipation for American labor.”214

The Wagner Act defined the right to organize as a fundamental right. However,
members of Congress based their enforcement power not in the Thirteenth Amendment,
but in their power to regulate interstate commerce. This decision was in part a strategic
one. At a time when Congress and the President were often at odds with the Court over
New Deal measures, Wagner and his allies believed that the best way to convince the
Court to uphold the Act was to justify it as preventing strikes, which were barriers to the
flow of interstate commerce.215 Wagner and his staff were also wary of using open-
ended language which would subject the Act to narrow interpretations by hostile
courts.216 Some members of Wagner’s staff also doubted labor’s reliance on the
Thirteenth Amendment, and simply preferred to rely on the more conventional language

211 79 Cong. Rec. 8537 (June 3, 1935).
212 79 Cong. Rec. 9699 (June 19, 1935).
214 79 Cong. Rec. 9713 (June 19, 1935).
215 See ZIETLOW, ENFORCING EQUALITY, supra note 10 at 80.
of interstate commerce. However, it is clear that the Act’s supporters believed that it protected not just economic rights, but fundamental human rights. Years later, Wagner’s sole legislative aide during that era, Kenneth Keyserling, recalled that Wagner believed that the Act was needed because “the working person’s freedom could only be secure when economic health had been assured . . . So you see, we were interested in the struggle to be free as well as the bread and butter issue.” According to Keyserling, Wagner believed that the primary purpose of the Act was “to make the worker a free man.” Wagner and the Act’s other supporters understood the connection between freedom and economic empowerment. They believed that both were necessary to combat the subordination of workers by their employers.

As Wagner had anticipated, the Supreme Court seized on the conservative narrative when it upheld the constitutionality of the Wagner Act in NLRB v. Jones. The Court held that the Act was justified as a measure to reduce the strikes that burdened interstate commerce. Since then, the courts have come to consider the right to organize as merely an economic right. The Court has construed the statute narrowly, substantially reducing its liberating potential. After Congress enacted the Wagner Act, union membership increased substantially, as did the standard of living for workers in

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217 Id. See also Pope, *The Thirteenth Amendment versus the Commerce Clause*, supra note 206 at 51-53 (2002).
219 Id. at 329.
220 See Id. at 319.
223 Id.
general in our country.\textsuperscript{224} This phenomenon reflected the wisdom of the Free Soilers in the Reconstruction Congress, who believed that improving the status of workers on the bottom would help all workers. Because the rise of industrialism and trade unionism occurred after the Civil War, there is little evidence that Free Soilers supported unionization or the right to strike.\textsuperscript{225} However, as members of the New Deal Congress recognized, the Wagner Act still serves as a good example of the economic aspect anti-subordination ideology of the Thirteenth Amendment. Problematically, that Congress excluded the primarily African American agricultural and domestic workers from the protections of the Wagner Act and other statutes that they enacted to protect workers.\textsuperscript{226} Wagner and his allies deliberately omitted those workers from the Act in order to win the support of segregationist Democrats in Congress.\textsuperscript{227} This tragic but necessary compromise limited the anti-subordinating effect of the Wagner Act for workers of color.\textsuperscript{228}

\textbf{B. The 1948 Anti-Peonage Act}

In 1939, President Franklin D. Roosevelt furthered the revival of the Thirteenth Amendment by creating the first Civil Rights Section of the Department of Justice ("CRS").\textsuperscript{229} Attorneys for the CRS focused primarily on enforcing the Thirteenth

\textsuperscript{225} See FONER, supra note 49 at 26-27.
\textsuperscript{226} For example, those workers were also excluded from the Fair Labor Standards Act, which established minimum wages and maximum hours for workers. See ZIETLOW, ENFORCING EQUALITY, supra note 10 at 94.
\textsuperscript{227} Id..
\textsuperscript{228} Notwithstanding this omission, workers of color in other industries benefitted from the Wagner Act, and the northern civil rights movement had its roots in the union movement. See Zietlow, Enforcing Equality, supra note 10 at 95-96; MARTHA BIONDI: TO STAND AND TO FIGHT: THE STRUGGLE FOR CIVIL RIGHTS IN POSTWAR NEW YORK CITY 17 (2003).
\textsuperscript{229} See CARR, supra note 47 at 1.
Amendment and Thirteenth Amendment based statutes, including the anti-peonage statutes and what remained of the Reconstruction Era Enforcement Acts.\(^{230}\) The CRS brought prosecutions for police brutality under the provision now codified as 18 U.S.C. §242.\(^ {231}\) They also brought a number of prosecutions under the anti-peonage statute, attempting to expand the New Deal protections for workers to the southern African American agricultural workers who had been excluded from many of the statutory protections.\(^ {232}\) Hence, the CRS attorneys “made the Thirteenth Amendment’s prohibition on involuntary servitude central to their practice.”\(^ {233}\)

The lawyers for the First Department of Justice Civil Rights Section recognized the connection between racial and economic subordination, especially in the Jim Crow South.\(^ {234}\) They engaged in a litigation strategy which started from the standpoint of economic rights and moved towards advocating racial justice. To accomplish this goal, they relied not on the Fourteenth Amendment, but on the Thirteenth Amendment, because that Amendment “offered the government lawyers the chance to work out the integration of the rights they had inherited and the rights they hoped to vindicate.”\(^ {235}\) Thus, they relied on an anti-subordination theory of equality, and called on members of Congress to amend and modernize the Anti-Peonage Act.

That same year, Congress responded to CRS requests and amended the Anti-Peonage Act to make it easier for CRS attorneys to win prosecutions under the Act.\(^ {236}\) The amendment replaced the phrase “slave trade” with the broader and more

\(^{230}\) GOLUBOFF, supra note 5 at 11; CARR, supra note 47 at 56-57, 77.

\(^{231}\) See CARR, supra note 47 at 24-26.

\(^{232}\) GOLUBOFF, supra note 5 at 11.

\(^{233}\) Id.

\(^{234}\) Id. at 80.

\(^{235}\) Id. at 114. See generally CARR, supra note 47 (describing the CRS litigation campaign).

\(^{236}\) See GOLUBOFF, supra note 5 at 150.
contemporary sounding phrase “involuntary servitude,” and the new provision made it a
crime to hold someone in a condition of involuntary servitude regardless of the existence
of any debt.237 There was no congressional debate about the provision, but there is
evidence that “the (CRS) lawyers thought these revisions would ideally enable
prosecutors to use a single statute to attack non-debt-based involuntary servitude,” by
clarifying that it applied to present day conditions of debt peonage.238 Coming shortly
after the Court’s ruling in Pollack, holding that the amendment was intended to
incorporate the Court’s generous interpretation of involuntariness.239 Until then, CRS
lawyers had often been stymied by the need to rely on more general Reconstruction Era
civil rights statutes to attempt to redefine the meaning of the 13th Amendment itself.240
They wanted to make it clear that the Thirteenth Amendment serves “as a basis for a
positive, comprehensive federal program – a program defining fundamental civil rights
protected by federal machinery against both state and private encroachment.”241 Their
allies in Congress evidently agreed.

V. Enforcing the Amendment - The Second Reconstruction and Beyond

The 1948 Democratic Party platform and the anti-peonage statute signaled a
renewed interest in civil rights legislation among some members of Congress. From
1937 to 1950, a flood of civil rights legislation was introduced in Congress.
Segregationists in Congress blocked or watered down that legislation until 1964, when
Congress enacted the first major civil rights legislation enacted since Reconstruction.

See GOLUBOFF, supra note 5 at 150.
238 See Goluboff, supra note 5 at 150.
239 See CARR, supra note 47 at 3.
Rev. 439; GOLUBOFF, supra note 5 at 150.
241 CARR, supra note 47 at 36.
The 1964 Civil Rights Act contained provisions prohibiting race discrimination in places of public accommodation, employment, and by recipients of federal funds.\textsuperscript{242} Despite the fact that the 1964 Act addressed the economic impact of race discrimination, members of Congress did not consider basing the act on their power to enforce the Thirteenth Amendment. Instead, they relied on Section Five of the Fourteenth Amendment and the Commerce Clause.\textsuperscript{243} By then, the Equal Protection Clause had replaced the Thirteenth Amendment in the imaginations of civil rights advocates. However, the 1964 Act provided a crucial precedent for other civil rights measures, and for Congress to enforce the other Reconstruction Amendments, including the Thirteenth, by enacting the 1968 Fair Housing Act.

At the turn of the Century, lawmakers turned their vision outward to address the international trafficking of workers with the Trafficking Victims Protection Act of 2000 (TVPA). Members of Congress debating that TVPA indicate a broad understanding of the “involuntary” work practices outlawed by the 13\textsuperscript{th} Amendment. In the first Twenty-First Century statute protecting rights of belonging, members of Congress adopted a comprehensive approach to the combined effect of economic, racial and gender subordination that characterizes the international trafficking of workers. Enacted with virtually unanimous approval, the TVPA thus reflects the Reconstruction Era anti-subordination philosophy and provides an excellent template for such measures in the future.

\textsuperscript{242} See generally Zietlow, To Secure, supra note 35.
\textsuperscript{243} Id. at 977-978.
A. 1968 Fair Housing Act

During the early years of the southern civil rights movement, activists focused primarily on the social stigma of racial segregation, instead of the economics of racial subordination. As the 1960s progressed, however, leaders in the civil rights movement turned their attention to the segregation of housing in the urban north. Urban riots in Watts, Los Angeles, and Detroit, Michigan, reflected the anger and frustration of Blacks who were forced to live in ghettos by discrimination in the housing market. Populations in those neighborhoods were concentrated, economic opportunities were few, and the riots made it impossible for lawmakers to ignore the harm caused by that discrimination. In 1968, members of Congress enacted the Fair Housing Act, which applied a comprehensive approach to fight race discrimination in real estate transactions. The members of the 1968 Congress recognized that the concentration of people of color in inner city ghettos reduced their access to economic opportunities. They sought to stop the subordination caused by the combination of race and economic discrimination in the housing industry.

On March 1, 1968, the Kerner Commission issued its report to Congress on race relations in the United States, warning that “America is dividing into two societies, black and white, separate and unequal . . .” According to the Kerner Commission, one of the chief manifestations of this inequality was residential segregation, which relegated

245 See Jean Eberhart Dubofsky, Fair Housing: A Legislative History and A Perspective, 8 WASHBURN L. J. 149, 154 (1969).
246 Id. at 153.
247 THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT, 114 CONG. REC. at S1960 (March 1, 1968), cited by Dubofsky, supra note 244 at 158.
Blacks to crowded urban ghettos. 248 Testifying on behalf of the Fair Housing Act, Whitney Young, Executive Director of the National Urban League, claimed that crowding in Harlem was so bad that “that if all the U.S. population lived at the same density, it could be housed in three of the five boroughs of New York City.” 249 Members of Congress invoked the unrest in the streets as they spoke in favor of a comprehensive statute that would outlaw race discrimination in real estate transactions and in the real estate industry. As Representative John Conyers explained, he believed that all people should have “the right to aspire to a life outside the ghetto, a life in which the tools for individual advancement are equally available to all.” 250 Two provisions of the Act, the “Anti-Blockbusting Provision” of the Fair Housing Act of 1968, which prohibits realtors from using race-based rumors to scare people into selling their homes at a reduced rate, and the 1968 Hate Crimes Act, which makes it a crime for a person to interfere in certain “federally protected activities,” including economic activities, on the basis of their race, were based on Congress’ Section Two power. 251

Opponents of the Fair Housing Act argued that the Act violated the Due Process Clause of the Fifth Amendment because it took away the right to convey property without

248 Id.
251 Fair Housing Act of 1968, 42 U.S.C. 3604(e); Hate Crimes Act of 1968, 18 U.S.C. §245 (the activities protected include including attending a school, participating in a government program, applying for or enjoying employment, serving as a state juror, travel in interstate commerce or using a public accommodation). A lower court has also held that the Public Works Employment Act, 42 U.S.C. § 6705(f)(5), which prohibits race discrimination in government contracts, was a valid exercise of the Thirteenth Amendment enforcement power. See Rhode Island Chapter, Associated General Contractors of America v. Kreps, 450 F.Supp. 338 (D.Ct. RI - 1978).
due process of law. Real estate associations from throughout the country opposed the act on that basis. Opponents also claimed that Congress lacked the power to enact the statute. They argued that the Act did not fall within Congress’ power to enact the Fourteenth Amendment because that power was limited to regulating state action. They claimed that the statute did not fall within the commerce power because real estate was immobile, and not within interstate commerce. They ignored the argument that the statute fell within the Section Two power.

In response, proponents claimed that the statute fell within Congress’ power to enforce the Fourteenth Amendment by remediating the states’ failure to protect individuals against private discrimination. This argument echoed the claims of Rep. Shellaburger

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253 See, e.g., Civil Rights Hearings Before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary U.S. S. Eighty-Ninth Congress Second Sess. on S. 3296, Amendment 561 to S. 3296, S. 1497, S. 1654, S. 2845, S. 2846, S. 2923, and S. 3170, 89th Cong., pt. 1 at 525 (1966) (Statement of J.D. Sawyer, Chairman, Realtor’s Ohio Committee, Legislative and Governmental Affairs Committee, Ohio Association of Real Estate Boards, Columbus, Ohio; Accompanied by Phil Fork, Legal Counsel and George Moore, President); Id. at 864 (Statement of John M. Stemmons, Vice Chairman, Legislative Committee, Texas Real Estate Association; Accompanied by H.W. Bahmann, President Texas Real Estate Association; George A. McCanse, Past President, Texas Real Estate Association; and Vincent J. Schmitt, Past President, Texas Real Estate Association); Id. at 919 (Statement of Harry G. Elmstrom, President, New York State Association of Real Estate Boards, Albany, N.Y.; Accompanied by William R. Magel, Executive Vice President); Id. at 1064 (Statement of Beryl Kenyon, Legislative Counsel, Michigan Real Estate Association; Accompanied by Everett Trebilcock, Legal Counsel).


255 Id.

and his Reconstruction allies, and had been articulated by Justice William Brennan in his concurrence to United States v. Guest. Supporters of the Act made it clear that they believed, and hoped that the Court was about to overturn the Civil Rights Cases, in which the Court had imposed the state action requirement on the Fourteenth Amendment. Supporters also claimed that the Act fell within the Commerce Power because race discrimination in real estate transactions substantially affects interstate commerce. They noted that the Court had upheld the 1964 Civil Rights Act on that ground in a decision that was extremely deferential to Congress’ power to regulate commerce. Finally, some supporters of the Bill invoked the Section Two power, pointing out that the Fair Housing Act was similar to the 1866 Civil Rights Act, also based on that power.

Speaking in favor of the Act, members of Congress equated the ghetto with prison. For example, Rep. William McCulloch explained that the legislation would be

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257 See supra, notes 155-157 and accompanying text.
259 Id.
similar to a writ of habeas corpus for a whole race of people because it would “decree that society has no right, no authority to imprison a man in a ghetto, because of his color.”\textsuperscript{263} Another supporter stated, “Men can be imprisoned outside of jails. The ghetto dweller knows that. The Negro knows that he is caged, that society really gives him nowhere else to go.”\textsuperscript{264} Thus, these members of Congress invoked the Reconstruction Era concern about mobility, and argued that the Act fit within their power to enforce the constitutional provision that prohibits involuntary servitude. As a congressional supporter emphasized, “the 13th amendment to the Constitution forever barred slavery and involuntary servitude in the United States. It was viewed by those who had approved it as abolishing not just enforced service of one person for another but as a guarantee to all citizens, of the outlawing of all the badges and incidents of slavery. One hundred and three years after its adoption the Congress has yet to remove all the disabilities of that servitude.”\textsuperscript{265}

Like their Reconstruction era predecessors, supporters of the 1968 Fair Housing Act also argued that they were enforcing the rights of citizenship. One supporter explained, “No matter how far we go away from the basic of the problem, we always get back to the fact that both the poverty areas, white and Negro—principally Negro—in this country have been deprived of the opportunity to be a full American citizen.”\textsuperscript{266} Another claimed that “[a]ny American citizen, since the formation of our country, has had the right to sell or rent his property or make loans to the person of his choice.”\textsuperscript{267}

\textsuperscript{264} 114 CONG. REC. H 2763.
\textsuperscript{265} 114 CONG. REC. H 2805 (1968).
\textsuperscript{266} 114 CONG. REC. H 2759 (1968).
\textsuperscript{267} 114 CONG. REC. H 2805 (1968).
claimed that the enactment of the thirteenth, fourteenth and fifteenth amendments “put our Nation officially on record in support of liberty and equality for all Americans.”  

Congressional debate over the Fair Housing Act was heated. The measure was introduced in 1966 and lengthy hearings were held that year, but it did not pass Congress until April of 1968, after the assassination of Martin Luther King set off another wave of riots in urban areas. Nonetheless, by enacting the 1968 Fair Housing Act, members of the “Second Reconstruction” Congress self-consciously furthered the anti-subordination tradition, establishing that “first class” citizens were entitled to be free of both race-based and economic subordination.

The Supreme Court never ruled on the constitutionality of the 1968 Fair Housing Act, but lower courts uniformly upheld it. In U.S. v. Bob Lawrence Realty, the Fifth Circuit held that the Fair Housing Act “Anti-Blockbusting” Provision is a valid exercise of Congress’s power to enforce the Thirteenth Amendment. In United States v. Bledsoe, the Eighth Circuit Court of Appeals sustained a conviction under the Hate Crimes provision of the 1968 Act of a defendant who had murdered a man in a public park because he was black. The court held that the statute fell within the Section Two power because “interfering with a person’s use of a public park because he is black is a badge of slavery.” Courts in the Second and Ninth Circuit also upheld the Hate

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269 For a thorough description of the congressional debate over the Act, see generally Dubofsky, supra note 244.
271 Dubofsky, supra note 244 at 160.
274 Id. at 1097.
Crimes provision under Section Two.\textsuperscript{275} It is thus abundantly clear that Congress can use its Section Two power to criminalize private interference with fundamental rights on the basis of race.

B. Anti-Trafficking Victims Protection Act of 2000

In the 1990s, members of Congress turned their attention to two related issues, violence against women and the international trafficking of women in the sex trades as they renewed the Violence Against Women Act of 1994 (VAWA) and enacted the Anti-Trafficking Victims Protection Act of 2000 (TVPA).\textsuperscript{276} While the VAWA was based on Congress’ power to regulate interstate commerce, the TVPA was based in Congress’ Section Two power. Supporters of the bill noted that from 600,000 to 2 million women a year are trafficked beyond international borders, with approximately 50,000 a year entering the United States.\textsuperscript{277} They noted that international trafficking is “one of the largest manifestations of modern day slavery internationally,”\textsuperscript{278} and remarked that “the trafficking of human beings for forced prostitution and sweatshop labor is a rapidly growing human rights abuse.”\textsuperscript{279} In the TVPA, members of Congress recognized that gender and economic subordination are combined in the international trafficking of workers, and adopted a comprehensive approach to stopping that trafficking.

\textsuperscript{275} See United States v. Nelson, 277 F. 3d 164 (2d Cir.), cert.denied, 537 U.S. 835; United States v. Allen, 341 F. 3d 870, 873 (9th Cir. 2003). In United States v. Lane, the Tenth Circuit Court of Appeals upheld the conviction under the same act of defendants who had killed a Jewish talk show host because of his religion and thus denied him of his “enjoyment of private employment,” in violation of the Act. U.S. v. Lane, 883 F. 3d 1484 (1989). In that case, the Court upheld the Act as an exercise of the Commerce Power.

\textsuperscript{276} Victims of Trafficking and Violence protection Act of 2000 (Pub. L. 106-386, Oct. 28, 2000, 114 Stat. 1464), codified at 22 U.S.C.A. §7101 et seq. (2000). The TVPA and the re-authorization of the Violence Against Women Act were combined in the Conference Report and enacted together. Members of Congress remarked that this combination was appropriate given the fact that they were address towards interconnected phenomena. See, e.g., 146 Cong. Rec. H9044 (remarks of Rep. Maloney). Both bills were top priorities of the Bi-partisan women’s caucus. Id.

\textsuperscript{277} See 146 Con. Rec. S10166 (remarks of Sen. Brownback).

\textsuperscript{278} Id.

\textsuperscript{279} 146 Cong. Rec. S10167 (remarks of Sen. Wellstone).
Supporters of the TVPA explained that the Act was necessary because the problem of sex trafficking had grown rapidly with the growth of the international economy, as had the practice of “debt bondage,” wherein “a person can be enslaved to the money lender for an entire lifetime because of a $50 debt.” They pointed out that this new form of slavery “does not look like the old forms associated with lifetime bondage as a chattel slave.” Like the victims of chattel slavery, some victims of trafficking are kidnapped in their home countries. However others are “deceived with offers of good work or a better life” and “lured into trafficking through false promises of jobs, good working conditions, high pay and foreign adventure.” The bill was intended to aid all victims of trafficking, regardless of whether they were taken by force or whether their “captor” used physical force to detain them.

While the bill was directed primarily at sex trafficking, it was also intended to remedy “slave-like conditions in jobs as domestic workers, factory workers, sex workers, nannies, waitresses, and service workers.” Rep. Pryce pointed out that “no matter how they are taken, trafficking victims are universally subject to cruel mental and physical abuse, including beatings, rape, starvation, forced drug use, confinement and exclusion.” Rep. Pitts contrasted this image with that of the freedom and equality that immigrants expect in the United States. She explained, “As Americans, we have always worked for justice and freedom in our borders and worldwide, and that is what this bill is

280 Id. at S10166 (remarks of Sen. Brownback).
281 Id.
283 Id.
284 Id. at H9044 (remarks of Rep. Millender-McDonald).
285 See, e.g., Id. at H9038 (remarks of Rep. Hyde); Id. at S10181 (remarks of Senator Welstone).
286 Id.
287 Id. at 9029.
all about.” Senator Barbara Mikulski elaborated, “We want this century to be one of democracy and human rights. We will not achieve this unless everyone, including the world’s poorest women, is able to control their own lives.”

The TVPA contained provisions to give victims of trafficking more control over their lives. As Senator Paul Wellstone explained, the traffickers preferred foreign workers because they were more easily intimidated and controlled. Some “captors” did little more than steal the passports of the victims, leaving them stranded in a foreign country, and subject to deportation if they complained to the authorities. To remedy this concern, the Act includes provisions making victims of trafficking eligible for public benefits and special visas allowing them to remain in the country at least while their captors are being prosecuted, and enabling them to petition for permanent residency. In this way, the Act’s sponsors sought to empower victims of trafficking so that they would not be afraid to resist their captors.

Another example of the anti-subordination approach to trafficking in the TVPA is that it applies not just to physical, but also “psychological” coercion against victims of trafficking. This provision was an amendment to the Anti-Peonage Act, necessitated by the Supreme Court’s ruling in United States v. Kozminske that the Anti-Peonage Act did not apply to psychological coercion. Rep. Hyde explained, “Twelve years ago, the Supreme Court held that our existing antislavery statutes only prohibited the use of force

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288 Id. at 9043.
289 Id. at S10176.
290 Id. at S10168.
291 Id.
294 Id. at S10181 (remarks of Sen. Wellstone).
or the abuse of the legal process to force a person into involuntary servitude. But the sad fact is that those who traffic in human beings today also use deceptive schemes and other lies, together with threats of force to family members in a home country, to coerce the victim into labor. This bill will now punish that criminal conduct.”

Thus, the TVPA, like the 1948 Amendments to the Anti-Peonage Act, was designed to overturn cramped Supreme Court interpretations of the meaning of slavery and peonage.

Finally, as with the other Section Two based legislation, members of 2000 Congress invoked the Reconstruction Era as they expanded the concept of slavery address by the Congress of that era. For example, Senator Brownback declared that the TVPA was not only a significant human rights bill, but also “the largest anti-slavery bill that the United States has adopted since 1865 and the demise of slavery at the end of the Civil War.” He saw himself and his colleagues as joining the “[p]eople of conscience (who) have fought against the different manifestation of slavery for centuries.” Rep. Hyde agreed that “[w]hile Lincoln may have freed the slaves in America, there are those today who engage in other forms of slavery on persons of many colors.” Thus, once again, members of Congress evoked Reconstruction as they acted to expand human rights beyond the borders of the United States and more expansively than the Court’s understanding of slavery and peonage.

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296 146 Cong. Rec. H9038. Senator Wellstone cited a similar case in which an “employer” required his farm workers live in a chicken coop that caught fire, causing the death of a worker. Wellstone explained, “Because the labor of the workers was maintained through a scheme of nonviolent and psychological coercion, the case did not fall under the involuntary servitude statutes, which could have result in life sentences given the death of one of the victims. Our legislation changes that. That is why this legislation is so important.” 146 Cong. Rec. 10181.
297 146 Cong. Rec. S 10166.
298 Id. at S10167.
299 Id. at 9038.
There was virtually no opposition to the TVPA during debates over the Act. The Act was a bi-partisan measure with support from both ends of the political spectrum, from Gloria Steinem and the NOW Legal Defense and Education Fund to the Southern Baptist Conference. The Act passed both houses of Congress on a virtually unanimous vote. By enacting the TVPA, members of Congress recognized the link between gender and economic based exploitation that occurs not just within this country, but throughout the world. This anti-subordination based civil rights measure is one of the farthest reaching ever – based on the Thirteenth Amendment and consistent with the goals of the Framers of that Amendment.

The enactment of the TVPA sets up a potential battle between the Court and Congress. The Kozinski decision was arguably based on both statutory and constitutional interpretation. The Court’s reading of §1584 was merely a matter of statutory interpretation because the Court limited itself to determining what Congress had understood “involuntary servitude” to be when they amended the Anti-Peonage Act in 1948. However, the Court’s understanding of the term “involuntary” was based on how it had defined the meaning of the term “involuntary servitude” in the Thirteenth Amendment. To the extent that Kozinski was a constitutional decision, the Court, influenced by Boerne, might find the TVPA to be unconstitutionally inconsistent with its own interpretation of the Thirteenth Amendment, the deferential precedent of Jones.

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300 See Id. at H9037 (remarks of Rep. Conyers); S10169 (remarks of Sen. Wellstone).
301 Compare Kozinski, 487 U.S. at 941 (noting that since the Kozinskis were convicted of conspiracy to violate “the Thirteenth Amendment guarantee against involuntary servitude . . our task is to ascertain the precise definition of that crime by looking at the scope of the Thirteenth Amendment prohibition of involuntary servitude.”) with id. at 944 (“We draw no conclusions from this historical survey about the potential scope of the Thirteenth Amendment.”)
302 Kozinski, 487 U.S. at 948.
303 Id. at 941.
 notwithstanding. However, in her opinion, Justice O’Connor framed the decision as a matter of mere statutory interpretation. She emphasized the fact that the Court relied on a doctrine of narrow construction of criminal statutes, not a reading of the Constitution.

Notwithstanding this potential conflict, lower courts have consistently upheld the TVPA. For example, in United States v. Marcus, Judge Ross of the Eastern District of New York upheld a conviction under the TVPA of a defendant who had used a psychologically coercive sexual relationship to obtain the victim’s sexual labor or services even though there was little evidence of physical coercion. The judge rejected defendant’s citation of Kozminski and instead relied on the TVPA, observing that “the TVPA’s legislative history makes clear that Congress enacted (the TVPA) as a response to the Court’s decision in Kozminski.” Similarly in United States v. Bradley, Judge DiCicero of the District of New Hampshire held that in a case where defendants were charged with threatening Jamaican tree workers with “threats of serious harm,” a jury instruction that defendants could not be convicted if the workers were able to flee was improper under the TVPA. The judge also treated the TVPA as overruling the Court’s interpretation of the Anti-Peonage Act in Kozminski. Thus, the lower courts are in agreement that Congress had the power to enact the TVPA, and are willing to enforce it as a potent tool of anti-subordination.

304 But see William Carter, Judicial review of Thirteenth Amendment Legislation: “Congruence and Proportionality” or “Necessary and Proper?,” 38 TOL. L. REV. 973, 982 (2007) (arguing that significant differences between the 13th and 14th Amendments justify more judicial deference toward Congress’ power to enforce the former amendment).
305 See Kozminski, 487 U.S. at 944.
307 Id. at 302.
309 Id. at 150.
VI. Conclusion: Freed at Last! The Future of Section Two

Both the language and the history of the Thirteenth Amendment make that provision a promising source of rights of belonging. Section Two empowers Congress to address race discrimination from the standpoint of an anti-subordination theory of equality, taking into account the economic circumstances that have contributed to the subordination of people of color throughout the history of our country. Section Two also enables Congress to take a comprehensive look at the conditions of workers in our country and enact legislation to remedy exploitative conditions in the workplace. Finally, Section Two enables Congress to remedy sex discrimination and gender based violence. As long as members of Congress reasonably believe that the practice that they are addressing amounts to slavery or involuntary servitude, or the badges or incidents of slavery, Section Two gives them the authority to act. Section Two thus gives members of Congress the power to redefine the meaning of “equality” in our society, to address the inter-connection of gender, race and economic subordination.

Most clearly, Congress may rely on Section Two to address the problematic relationship between race discrimination and economic distress in our society. The members of the Reconstruction Congress understood that slaveholders relied upon racism as a social mechanism to legitimate slavery, the exploitation of the labor of people of color. Thus, members of Congress could use Section Two to outlaw practices which have a discriminatory impact on racial minorities, regardless of evidence of discriminatory intent. 310 Section Two also empowers Congress to consider the meaning

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310 Other scholars have made this argument. See Carter, Race and Rights, supra note 19 at 1328; Miller, White Cartels, supra note 19 at 1045 (Arguing that Congress might use its power to enforce the Thirteenth
of liberty within the employment relationship, and outlaw practices which members of Congress reasonably believe deprive workers of their liberty. Finally, Section Two may empower Congress to address gender discrimination and economic injustice within the realm of family law.

The abolitionist roots of the Thirteenth Amendment are still relevant in Twenty-First Century society. Section Two empowers Congress to protect fundamental human rights to enable outsiders to belong as fully productive members of our society, free from race discrimination and economic exploitation. When members of Congress have acted to enforce the Thirteenth Amendment, they have tried to eliminate the roots of inequality in our society with a comprehensive anti-subordination approach. In the Twenty-First Century, members of Congress should follow their lead to address both private and government practices that impeded the ability of the historically disempowered to participate effectively in our society, and re-define the meaning of “equality.”

Amendment to outlaw disparate impact, and to prevent individual isolated discrimination, if Congress rationally determines that the discrimination would “have the effect of locking out African Americans from valuable social, economic, or political opportunities.”). Unlike its interpretation of the 14th Amendment, the Supreme Court has not limited the Amendment to intentional discrimination. See General Building Contractors Ass’n v. PA, 458 U.S. 375, 390 n. 17 (1982) (holding that 42 U.S.C. §1981 only applies to intentional discrimination, but leaving open the question of whether “The Thirteenth Amendment itself reaches practices with a disproportionate effect as well as those motivated by a discriminatory purpose.”); Memphis v. Greene, 451 U.S. 100, 128-129 (1981) (declining to “speculate about the sort of impact on a racial group that might be prohibited by the Thirteenth Amendment” since the impact in that case did not violate it). See Carter, supra at 1328.

311 For example, Congress might want to legislate to improve the rights for immigrant workers who are required to work in sweat shop like conditions. See Maria Ontiveros, Non-citizen Immigrant Labor and the Thirteenth Amendment: Challenging Guest Worker Programs, 38 TOL. L. REV. 923, 925 (2007); Kathleen Kim, Psychological Coercion in the Context of Modern Day Involuntary Labor: Revisiting U.S. v. Kozinski and Understanding Human Trafficking, 38 TOL. L. REV. 941, 962 (2007). Members of Congress could also rely on Section Two to amend the National Labor Relations Act to reinvigorate the right to strike by prohibiting the employer’s hiring of replacement workers. (On the loss of the right to strike, see Pope, supra note 222 at 527-534 (2004).

312 Throughout the debates over the Thirteenth Amendment, members of Congress deplored the impact that slavery had on families. Many pointed out that slaves had been unable to maintain families, that slavery had led to the loss of their loved ones, and that the end of slavery should provide an opportunity for freed slaves to begin a family life. For example, Ebon Ingersoll argued that one of the “God given rights” of freed slaves was the “right to endearments and the enjoyment of family ties.” See Cong. Globe 38th Cong. 1st Sess. at 2289, 2290 (1864), cited in ten Broek, supra at 178.